# Court of Queen's Bench of Alberta

**Citation: 557466 Alberta Ltd v McPherson, 2022 ABQB 23**

**Date:** 20220107
**Docket:** 2101 00061
**Registry:** Calgary

Between:

**557466 Alberta Ltd o/a LDV Pizza Bar**

Appellant/Plaintiff

- and -

**Sherry McPherson and the Alberta Human Rights and Citizenship Commission**

Respondents/Defendants

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**Reasons for Judgment**
**of the**
**Honourable Mr. Justice N.E. Devlin**

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## I. Introduction

[1] Firing someone because they are pregnant is blatant gender discrimination. The Alberta Human Rights Tribunal found that the appellant restaurant had done just that and admitted to it. The Tribunal ordered that significant damages for the victim of the discrimination. That result is now appealed to this Court.

[2] Unfortunately, while the factual finding of discrimination was amply supported by the evidence, the hearing was unfair and raised a reasonable apprehension of bias. Unrestrained bad character evidence about the appellant's principal was admitted and the Tribunal repeatedly and

improperly interfered with his attempts, as a self-represented litigant, to cross-examine the complainant.

[3] For the reasons that follow, therefore, the appeal is allowed and a new hearing is ordered.

## II. Facts

[4] Sherry McPherson ("McPherson") worked as a server at LDV Pizza Bar ("LDV") for ten months, between July of 2013 and May of 2014. She was terminated on May 5, 2014,[1] less than two months after she shared the news of her pregnancy with LDV's manager, Rocco Cosentino ("Cosentino").

[5] On February 6, 2015, McPherson lodged a discrimination complaint with the Alberta Human Rights Commission (the "Commission"), alleging discrimination on the basis of gender. The matter proceeded to a full hearing before the Alberta Human Rights Tribunal (the "Tribunal") in October of 2020. No explanation for the delay in this matter being heard has been offered.

[6] In reasons reported at 2020 AHRC 83, the Tribunal preferred McPherson's evidence and found that LDV discriminated against her on the basis of gender. The Tribunal awarded McPherson $23,000 in general damages and $10,648.31 for lost wages.

[7] LDV appeals both the finding of discrimination and the damages award, pursuant to the statutory right of appeal provided by section 37 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (the "*AHRA*"). This provision was in force when the appeal was filed but has since been repealed. This appeal continues pursuant to the transitional provisions in section 45.1: SA 2021 c25 s2.

[8] At the hearing before the Tribunal, McPherson and a former Employment Standards investigator, Hero Azar ("Azar"), testified for the Commission. Cosentino and his sister Catherine, who co-managed the family restaurant, testified for LDV.

[9] McPherson testified that she was hired by LDV as a server in July of 2013 and let go in May of 2014. She worked as a part time employee throughout and considered both Cosentino siblings to be her supervisors.

[10] At the time McPherson worked there, LDV was open Tuesday through Sunday. For part of 2013, she was held two jobs and between July 2, 2013 and January 20, 2014, she worked approximately two shifts per week at LDV; these were exclusively evening shifts. From February 3, 2014 to April 28, 2014, McPherson worked an average of four evening shifts per week at LDV. No scheduling information was provided for March 4 to 23, 2014. Between July, 2013 and May 5, 2014, McPherson worked only one lunch shift.

[11] In mid-March of 2014, McPherson shared the news of her pregnancy with the Cosentinos. She was four months pregnant at the time. McPherson testified that things changed between her and Cosentino thereafter. Specifically, she testified that she felt her shifts began to be cut back.

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[1] There is some conflict in the evidence as to whether certain events occurred on May 5th or 6th. It appears clear that the termination occurred on the Monday of the relevant week, which was May 5, 2014.

[12] LDV's practice was to email the weekly schedule to employees each Sunday. Ms. Cosentino testified that most employees had regular shifts and any schedule changes were discussed with them ahead of time. On Monday, May 5, 2014, at 2:40 am, McPherson received her work schedule for the upcoming week. It showed her scheduled to work four lunch shifts that week, which she perceived as a radical change to her work pattern.

[13] Cosentino agreed that the May 5, 2014 schedule constituted a last-minute change in McPherson's work schedule, and that evening shifts were more lucrative than lunch time work, as servers made more money in tips.

[14] McPherson testified that she emailed Cosentino shortly after receiving the schedule, stating that she had made arrangements to work the four lunch shifts that week but requesting a return to her regular evening shifts thereafter (the "Request Email"). The Request Email stated that she enjoyed her employment with LDV and believed Cosentino to be an "excellent employer". She advised that she had no intention of stopping work until she went on maternity leave, saying: "As you know, I only have a few months left and would like to maintain my shifts and schedule until then."

[15] McPherson told the Tribunal that, after she sent the Request Email, she spoke to Cosentino by telephone and he terminated her employment. Both she and Cosentino testified that he said something in that conversation to the effect that he could no longer yell at McPherson because she was eight months pregnant (she was in fact six months pregnant). McPherson's evidence was that Cosentino expressly referenced her pregnancy as the reason for firing her.

[16] Cosentino denied this. He said he terminated McPherson for her attitude and that her insistence on returning to evening shifts was the last straw. His evidence was that the phone conversation preceded the Request Email, which he said was a ruse to make it look like McPherson was being flexible and cooperative, in contrast to who she had behaved on the phone. He testified that McPherson had been rude and insistent in their conversation.

[17] Despite the verbal termination, McPherson showed up to work her lunch shift at LDV on May 6, 2014. She testified that this was to avoid any later accusation that she missed her shift. McPherson worked 1.53 hours that afternoon before Cosentino told her to leave the restaurant, reiterating that she had been let go.

[18] On May 7, 2014, Cosentino paid McPherson her outstanding tips. Approximately a month after her termination, McPherson received her final pay cheque and a Record of Employment ("ROE"), which listed "shortage of work" as the reason for termination.

[19] McPherson was neither paid severance nor provided documentation regarding her termination. She pursued both, testifying that this exercise consumed most of her time between when she was fired and the arrival of her child.

[20] Payroll documentation showed that, from February 3, 2014 to March 24, 2014, McPherson worked an average of 23.27 hours per week at LDV. From March 30, 2014, two weeks after McPherson told Cosentino she was pregnant, until April 30, 2014, her average hours worked per week decreased to 15.51.

[21] McPherson testified that she was not physically limited by her pregnancy and was fully capable of continuing to work evening shifts at LDV. After her termination, however, McPherson did not look for other employment. She attributed this to the short time remaining

before her son was born, her inability to secure a reference letter from LDV, and the stress related to the loss of her job.

[22] On September 24, 2014, McPherson sent Cosentino a letter generated through the provincial government's Employment Standards website, demanding $187.25 as severance pay in lieu of notice. Because McPherson had worked at LDV for less than a year, she was entitled to only one week of termination pay. McPherson ultimately received this amount from LDV five months after she was let go.

[23] Azar testified that she was assigned McPherson's Employment Standards file while working as an employment standards investigator. She testified that she spoke to Cosentino by phone and was shocked when he told her that McPherson's shifts had been reduced and she was fired because she had become pregnant. Azar testified that she advised both parties there might be a human rights issue, but stopped short of advising McPherson to file a complaint.

[24] Both parties agreed that McPherson's formal work record contained no complaints or performance concerns. Despite this, when Cosentino replied to McPherson by email on September 25, 2014, he outlined reasons for her termination that centered on her attitude and performance, stating that McPherson was let go because of customer and staff complaints about her attitude, dropping work performance, insubordination through a raised voice on one occasion, her bad-mouthing regular customers, and her refusal to accept the May 5, 2014 schedule. Cosentino's September 25, 2014 email to McPherson, which the Tribunal included in full in its decision, was the first time any concerns were raised in writing regarding her performance.

[25] When cross-examined about the reason for McPherson's termination, Cosentino maintained that it was because of her poor attitude and because LDV was always having to work around her schedule. He also testified that he had never heard of anyone being terminated with notice.

[26] Ms. Cosentino testified that LDV had had pregnant servers before, with no issue, and that they had never fired anyone before at all. She told the Tribunal that McPherson had not asked for any accommodations because of her pregnancy and was let go for an accumulation of small things, culminating in her complaining about being scheduled to work lunch hour shifts. She testified that McPherson had a bad attitude and had once been verbally reprimanded, but agreed that there was no record of any employment discipline.

## III. The Tribunal's Decision

[27] The Tribunal found that Cosentino did not discuss the possibility of a change to lunch shifts with McPherson prior to circulating the contentious schedule. It analyzed the evidence around the sending of the schedule, the Request Email, and the termination conversation. The Tribunal considered the inconsistency between Cosentino's reasons for firing McPherson in each of the phone call, the ROE, and his September email responding to her termination pay request.

[28] Based on its consideration of this evidence, the Tribunal found that the Request Email was sent before the termination conversation, thus rejecting Cosentino's version of events. It concluded that the Request Email was not a refusal to work and rejected Cosentino's argument that it was a ploy in response to the termination conversation.

[29] The Tribunal further found that the evidence showed an overall reduction in McPherson's hours of work, beginning shortly after the announcement of her pregnancy, which LDV had failed to reasonably justify.

[30] The Tribunal considered the Cosentinos' evidence about McPherson's alleged poor attitude and performance. It found that this evidence was self-serving and should be given little weight since it was not put to McPherson in cross-examination. The Tribunal concluded that "the Cosentinos dissected the complainant's work history with a fine-tooth comb to come up with anything they could."

[31] The Tribunal found that McPherson did not embellish or inflate circumstances in her evidence, which it found to be more consistent with the contemporaneous documents and corroborated by Azar's independent testimony. For these reasons, together with the consistency of McPherson's story over time, the Tribunal preferred her evidence over that of LDV's witnesses.

[32] The Tribunal accepted McPherson's evidence that Cosentino gave her pregnancy as a reason for firing her and found as a fact that he made the statements attributed to him in the termination conversation.

[33] This conclusion was buttressed by the fact that Cosentino resided in his evidence from what had been written on McPherson's ROE, namely that she had been let go for "shortage of work". The Tribunal declined to find that McPherson's job performance played any real part in the decision to change her hours of work or terminate her employment.

[34] The Tribunal considered Azar's evidence and noted that an email she had sent to Cosentino at the time specifically referenced a prior phone call, contrary to Cosentino's evidence that he never spoke with her. The Tribunal accepted Azar's evidence and found as a fact that Cosentino had told he fired McPherson's in part because of her pregnancy.

[35] The Tribunal then performed an analysis to determine whether McPherson had established prima facie discrimination, as guided by ***Moore v British Columbia (Education)***, 2012 SCC 61, and concluded as follows:

> I am persuaded that Rocco Cosentino stated to both the complainant and Ms. Azar that the reason for the respondent's actions were related to the complainant's pregnancy. It necessarily follows that the protected ground was clearly a factor in the adverse impact. The complainant's case is been made out and I find *prima facie* discrimination.

[36] The Tribunal then went on to examine whether the discrimination was reasonable and justifiable in the circumstances. I confess to being confused about the reason for this analysis, though it appears that the Commission argued that the circumstances in some way engaged the bona fide occupational requirement test set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)***, [1999] 3 SCR 3 ("***Meiorin***"). As will be discussed in these reasons, I find that this analysis was superfluous in this case as LDV never attempted to justify McPherson's termination on the basis that it could not accommodate her pregnancy. Rather, its defence was a denial of any causal connection between McPherson's pregnancy and her firing, thus denying any discrimination whatsoever.

[37] In respect of damages, the Tribunal accepted McPherson's reasons for not seeking further employment before her due date, including that she "spent hundreds of hours" attempting to get Employment Insurance maternity benefits. The Tribunal concluded that she had satisfied any duty to mitigate. McPherson was found to have lost 14 weeks of work at LDV. Based on its best estimate of her hourly earnings and tips, the Tribunal awarded $10,648.31 for lost wages.

[38] In awarding general damages, the Tribunal found that the discrimination had a "very negative impact" on McPherson, resulting from LDV's "indifference to the consequences of its actions on this complainant" and its overall "reckless" behavior. The Tribunal accepted that McPherson's "tearful testimony reflected a genuine sadness that her son only knows a mother who is less confident than she once was" as a result of the discrimination. The Tribunal considered recent guidance on pregnancy-based discrimination, including ***Pelchat v Ramada Inn and Suites (Cold Lake)***, 2016 AHRC 11 and ***Bickell v The Country Grill***, 2011 HRTO 1333. Finding that the discrimination in this case had "serious and long lasting" impacts, it awarded $23,000 in general damages, for a total award of $33,648.31.

## IV. The Appeal

[39] LDV appeals the Tribunal's decision pursuant to section 37 of the AHRA, which provided, in part, as follows:

> Appeal
>
> 37(1) A party to a proceeding before a human rights tribunal may appeal an order of the tribunal to the Court of Queen's Bench by application filed with the clerk of the Court at the judicial centre closest to the place where the proceeding was held.
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> …
>
> (4) The Court may
>
> > (a) confirm, reverse or vary the order of the human rights tribunal and make any order that the tribunal may make under section 32, or
> >
> > (b) remit the matter back to the tribunal with directions.

[40] LDV argues that the Tribunal: (i) misapplied the ***Meiorin*** test; (ii) made unreasonable findings of fact; (iii) conducted the hearing in a manner that gave rise to a reasonable apprehension of bias; and (iv) awarded manifestly excessive general damages.

## V. Standard of Review

[41] At the all relevant times, the *AHRA* granted a statutory right of appeal from Tribunal decisions. Therefore, the principles and standards of review governing appellate review apply: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 37 ("***Vavilov***"). This ousts the presumption of review for "reasonableness": **Vavilov** at paras 36-37, ***Sunshine Village Corporation v Boehnisch***, 2020 ABQB 692 at para 91 ("***Sunshine***").

[42] Findings and inferences of fact and the factually-informed dimension of questions of mixed fact and law are reviewed on a standard of palpable and overriding error: ***Housen v***

***Nikolaisen***, 2002 SCC 33 at paras 10-36 ("***Housen***"). Legal conclusions and applications of legal principles are reviewed on a standard of correctness: ***Housen*** at paras 8-9.

[43] The Tribunal's findings of fact should be treated with deference and disturbed only when they are clearly wrong: ***HL v Canada (Attorney General)***, 2005 SCC 25 at para 55. In ***Sunshine*** at paras 94-99, I considered in some detail the meaning of "palpable and overring error":

> The two components of the phrase 'palpable and overriding error' respectively convey that such an error will be "clear to the mind or plain to see" or "obvious" and also must discredit the result at its root. Any mistake will not suffice. The error must be one of "crucial law, fallacy or mistake" that impacts the outcome: ***HL*** at paras 69-70; ***Mahjoub v Canada (Citizenship and Immigration)***, 2017 FCA 157 at para 62.
>
> The nature of this standard was aptly described by Stratas, JA in ***Canada v South Yukon Forest Corporation***, 2012 FCA 165 at para 46, subsequently adopted by the Supreme Court in ***Benhaim v St-Germain***, 2016 SCC 48 at para 38:
>
> > …"Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> This highly deferential approach applies to direct findings of fact, inferences of fact, and findings on the credibility of witnesses: ***R v Paxton***, 2016 ABCA 361 at para 23. As Slatter, JA succinctly stated in ***Gray v McNeill***, 2017 ABCA 376 at para 18:
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> > …This court does not reweigh evidence. This court does not ordinarily disturb inferences which might reasonably be drawn from proven facts. This court does not ordinarily disturb credibility findings, especially when reasons are given for such findings in circumstances where credibility is attacked.
>
> The proper approach to be taken when an appellant attacks a factual conclusion is defined in ***Housen*** at paras 22-23, where the Supreme Court provided the following guidance:
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> > …Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that <u>where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error</u>. As stated above, trial courts are in an advantageous position when it comes to <u>assessing and weighing</u> vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. <u>Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.</u>

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. […] [Emphasis in original.]

This means that a factual conclusion, inference, or credibility finding, must be absolutely unsupported by the evidence, and completely unavailable on the record through logical reasoning, before a trier of fact's decision to reach that conclusion will be wrong. The appellate reviewer is not to re-weigh the evidence anew, even if he or she considers a different conclusion to have been preferable on the evidence.

Finally, given the difficulty in establishing this high level of definitive error, appellants will often attempt to dress up attacks on factual findings as breaches of the duty of procedural fairness, excesses of jurisdiction, a failure to give reasons, or some other species of legal error. Courts fulfilling a statutory appellate function must be watchful for these forms of conceptual sleight-of-hand, and avoid the temptation to interfere where the high threshold of palpable and overriding error is not met.

[44] That said, ***Vavilov*** has not relieved statutory tribunals from respecting basic principles of procedural fairness. Alleged breaches of fairness and procedural justice continue to be reviewed on a standard of correctness under established principles of administrative law, though augmented with the familiar appellate principles as to impact and remedy: ***Sharma v Canada (Minister of Citizenship and Immigration)***, 2020 FC 381at para 12; ***Vavilov*** at para 77; ***Moffat v Edmonton (City) Police Service***, 2021 ABCA 183 at para 42.

## VI. Analysis

### A. Accommodation

[45] LDV's first grounds of appeal relate to the Tribunal's conclusion that the Request Email constituted a request by McPherson to accommodate her pregnancy. LDV argues that this conclusion was unreasonable and that the Tribunal misapplied the ***Meiorin*** test. Consistent with my understanding of the law articulated above, I will consider whether the impugned conclusions demonstrate palpable and overriding error.

[46] The Tribunal's finding of discrimination based on the schedule change is not unreasonable. McPherson's uncontested evidence was that she had midwifery appointments in the afternoon, as stated in the Request Email, and this was part of her reason for seeking a return to evening shifts. For LDV to avoid discrimination, it was incumbent upon Cosentino to inquire as to what changes within the contentious schedule would be required specifically in relation to McPherson's pregnancy.

[47] It is clear, however, that conflicts with her midwifery appointments were simply one concern animating McPherson's displeasure with the schedule. Her main sources of dissatisfaction were that lunch shifts would be significantly less lucrative and would interfere with her volunteer yoga instruction. On the existing record, McPherson's lifestyle and money-based preference for evening shifts was never disaggregated from her pregnancy-related needs.

[48] The duty to accommodate is limited to constraints placed on an employee's ability to work by a protected personal characteristic: see ***City of Ottawa v Ottawa-Carleton Public Employees' Union, Local 503 (Beaulieu Grievance)***, [2010] OLAA No 343 at paras 28, 33-45. Pregnant employees do not have an entitlement to preferable working conditions *simply because* they are pregnant. Rather, needs *arising from* pregnancy must be accommodated. This is an important distinction.

[49] Ultimately, however, the accommodation issue is a red herring. The question of whether failing to accommodate McPherson's preference to work primarily evening shifts *would have been* a breach of the duty to accommodate is irrelevant given that LDV was found to have fired her because she was pregnant. For its part, LDV never defended its actions on the basis that working the contentious schedule was a *bona fide* employment requirement or that accommodating McPherson's needs would be an undue hardship on the business. Therefore, the accommodation issue was neither necessary nor ripe for decision.

[50] The essence of the complaint was that LDV had dismissed McPherson because she was pregnant. The Tribunal found that Cosentino had admitted this to both McPherson and Azar. This was a clearer, and arguably worse, form of gender-based discrimination than a reduction in her work schedule. As such, discrimination could be found without resort to the ***Meiorin*** analysis. That the termination was the proper focus of the discrimination analysis is reflected in the fact that damages were ultimately awarded only for McPherson's loss of work due to termination and not for the preceding reduction in work.

[51] Application of the ***Meiorin*** test should be avoided in cases where accommodation was never sought or considered: ***Sunshine*** at paras 175-180. It properly applies where the parameters of necessary accommodation arising from the protected personal characteristic are clearly delineated to the employer, who rejects them on the basis of undue hardship. Neither happened here.

### B. Termination

[52] While the Tribunal's finding of a failure to accommodate was inapt, this does not assist LDV. First, that conclusion was not palpably wrong. Second, and more importantly, LDV was also found to have discriminated against McPherson by firing her because she was pregnant. As discussed below, that finding betrays no error and was not palpably wrong.

#### 1. Evidence that McPherson was Fired Because of her Pregnancy

[53] The Tribunal had before it evidence of two conversations that established a discriminatory firing. First, McPherson testified that during the conversation in which he fired her, Cosentino said:

> I just can't deal with this. I just can't deal with your condition anymore… I'm going to have to let you go.

[54] She testified that he added:

> Of course I'm firing you. You're eight months pregnant. I can't have you working in this restaurant.

[55] When asked if Cosentino had offered any rationale for why he could not have a pregnant server working at LDV, McPherson testified as follows:

> Yes he did. And the reason was because he couldn't yell at me in my condition. Or, sorry, he could not raise his voice to me in my condition.

[56] LDV's factum sensibly concedes that "the optics of the statement are poor", but it is more than that. The Tribunal's finding of fact that Cosentino made this statement logically and legally supports a conclusion that LDV contravened section 7 of the *AHRA* by depriving McPherson of her job because she was pregnant, thereby committing a prohibited act of gender discrimination.

[57] Perhaps even more damaging was Azar's evidence that, in her telephone conversation with Cosentino:

> … at some point he outright admitted that Ms. McPherson's scheduled shifts and that [sic] the tenability of her employment had suffered because she had become pregnant…

[58] The Tribunal was entitled to accept this evidence and did so, leading to a reasonable and supported finding of fact that LDV fired McPherson because she was pregnant. Thus, the conclusion that LDV discriminated against McPherson on the basis of gender was supported by strong, direct evidence and is unimpeachable.

### 2. Findings Regarding Scheduling

[59] Much of LDV's argument was devoted to attacking the Tribunal's conclusion that McPherson's shifts had been reduced as a direct result of her pregnancy announcement. On my review of the record, I do not find palpable error in the Tribunal's conclusion. It was one of the viable interpretations of the scheduling evidence, even if the evidence was not as definitive on the point as the Tribunal's reasons might suggest.

[60] More importantly, this is a subsidiary issue. Again, the primary act of discrimination in this case, and the one for which compensation was awarded, was firing McPherson because of her pregnancy. Therefore, even if the Tribunal's treatment of the scheduling evidence was palpably in error, that error was not an "overriding" one: ***Mahjoub v Canada (Citizenship and Immigration)***, 2017 FCA 157 at paras 62-64.

[61] Shift scheduling was, at most, a source of collateral and corroborative evidence of discrimination. A finding of prohibited discrimination was amply justified on what Cosentino said, during, and about, McPherson's firing.

[62] I would add that LDV's argument that Cosentino's statements about McPherson's pregnancy are better read as an "empathetic and compassionate" expression of concern for letting her remain in a "toxic environment" during her "delicate condition", effectively repeats the discrimination and does not ameliorate LDV's position.

[63] The factual finding that Cosentino made the statements about her pregnancy that McPherson attributed to him, was supported by the evidence and open to the Tribunal. There is no palpable and overriding error in this finding. Nor, applying administrative law principles, was

it in any way unreasonable. The grounds of appeal concerning unreasonable fact finding and misapplication of the duty to accommodate are dismissed.

### C. Reasonable Apprehension of Bias / Unfairness

[64] LDV's next ground of appeal is that the Tribunal's interventions, unequal scrutiny of evidence, and irrational findings regarding McPherson's credibility demonstrate bias sufficient to vitiate the proceeding.

#### 1. Legal Principles

[65] It is trite law that a quasi-judicial fact-finder must both be, and appear to be, impartial: ***R v S (RD)***, [1997] 3 SCR 484 at para 92 ("***RDS***"). The Court defined "bias" at para 105 as "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues".

[66] The threshold for finding real or perceived bias is high. There is a strong presumption that judges and quasi-judicial officers will carry out their oath to render justice impartially: ***R v Wilson***, 2019 ABCA 502 at para 27. The standard for determining whether a reasonable apprehension of bias exists in a proceeding was laid out by the Supreme Court in ***Committee for Justice and Liberty et al v National Energy Board et al***, [1978] 1 SCR 369 at 394:

> …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".

[67] Where the alleged bias involves the nature and conduct of the hearing itself, the reviewing Court must consider the complaint in light of what a fair hearing means and is meant to achieve. The Supreme Court described this in ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817 at para 22:

> …the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added.]

[68] The standard of review for reasonable apprehension of bias is "whether a fully informed observer, considering the context of the entire proceedings, would reasonably conclude that the trial judge was not impartial": ***R v Switzer***, 2014 ABCA 129 at para 4 ("***Switzer***"), relying on ***RDS*** at paras 111-112. The standard of review for the appearance of a fair trial is whether a party "might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial:" ***Switzer*** at para 5, citing ***R v Valley*** (1986), 26 CCC (3d) 207 at 232 (Ont CA), leave to appeal refused [1986] 1 SCR xiii.

[69] There is no deference in respect of fairness or apprehension of bias, which are reviewed on a standard of correctness: ***R v Schmaltz***, 2015 ABCA 4 at paras 13-14 ("***Schmaltz***").

Unfairness, or the appearance of it, mandates appellate intervention: ***R v Olusoga***, 2019 ONCA 565 at para 13.

**2. Alleged Instances of Bias / Unfairness**

[70] Several facets of the Tribunal hearing give cause for concern, particularly in light of the fact that Cosentino represented LDV, effectively as a self-represented litigant ("SRL").

*a. Admission of Bad Character Evidence*

[71] Bad character evidence is generally inadmissible in a civil proceeding: ***Saskatchewan v Racette***, 2020 SKCA 2 at para 23, leave to appeal dismissed 2020 CanLII 32301 ("***Racette***"); Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed (Toronto: Butterworths, 1999) at 10.24 and 10.25. A litigant's general disposition is rarely relevant at trial. For character evidence to be admissible, it must be probative of something other than a general propensity for poor conduct and its probative value must outweigh its prejudicial effect: ***R v Handy***, 2002 SCC 56 at para 71; Racette at para 28. This is no less the case before an administrative or quasi-judicial tribunal: ***Dhawan v College of Physicians and Surgeons of Nova Scotia***, 1998 NSCA 83 at para 59; ***Petterson v Gorcak***, 2009 BCHRT 439 at paras 37-38.

[72] The rule against bad character evidence is principally concerned with trial fairness: ***Racette*** at para 41; S. Casey, David M. Tanovich & Louis P. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 4th ed (Aurora, Ont: Canada Law Book, 2005) at 9.30.10. It applies with equal force when the bad character evidence in question relates to a corporation or its agents. While LDV was the corporate owner of the restaurant, there was never any pretense that this proceeding was anything other than an indictment of Cosentino's conduct.

[73] McPherson's evidence made it clear that she harboured considerable personal animus against Cosentino. She peppered her evidence with statements such as that Cosentino was "a liar who attacks me at all angles", that she could not work in the neighbourhood because she was worried he would "come there and make a scene", and that she "can't imagine how many other people have had to deal with this." None of these statements were admissible or germane, but all were accepted into evidence without comment.

[74] The worst instance of bad character evidence arose in McPherson's evidence in-chief:

> A: …I had a frickin' X-Acto knife by my back window because I thought I might have to slash my window to jump out my window because I didn't know if he was going to come and – try and come to my house. I didn't know. Everybody likes to talk about Mafia and stuff like that. I don't know. I don't know what he's up to. All I know is that I've seen him almost physically accost a health inspector. I've seen him scream and yell at customers. I see him scream and yell at his staff. And then I'm put in this position - -
>
> Cosentino: Objection. Objection.
>
> The Chair: No. Stop. Stop. Mr. Cosentino, this is not the time for you to object to what she is saying.
>
> A: Example right there…
>
> [Emphasis added.]

[75] The Tribunal's handling of this evidence and objection was doubly problematic. Not only was a well-founded and appropriately timed objection overruled, but the witness was permitted to gratuitously suggest that Cosentino's objection to being described as a possible mafioso was further evidence of his aggressive, even criminal character. It is difficult to understand why McPherson was not cautioned about giving bad character evidence and why this diatribe against Cosentino was permitted and even condoned.

[76] A trial judge or tribunal chair has a gatekeeper role in preventing the inappropriate admission of bad character evidence: ***Racette*** at para 41; ***Neumann v Lafarge Canada (No 4)***, 2008 BCHRT 303. This is even more acutely the case where one party is effectively self-represented. Although a Human Rights Tribunal may operate with somewhat relaxed rules, maintaining a good standard of evidentiary hygiene is healthy for any proceeding. The unchecked admission of irrelevant bad character evidence changes the tenor of any hearing, and not for the better. It detracts from the dignity and fairness of the proceeding and distracts from the focus on a just outcome.

[77] While a trial will rarely be overturned merely because bad character evidence was admitted, legal errors of this kind must be considered cumulatively with other allegations of unfairness or appearance of bias: ***Racette*** at para 45.

*b. Interference with First Question*

[78] Cosentino began his cross-examination by asking McPherson why she had provided her T4 for 2014, but not for 2013, given that the lion's share of her employment with LDV had been in 2013. The Chair immediately cut him off, saying "so if you had wanted that information, you could have asked for it." She told Cosentino that he "had a lot of time to ask for it before" and that she was "simply not going to allow that line of questioning." There had been no objection and it is unclear on what legal basis the Chair refused this question.

[79] While the prohibited question may not have been probative of much, representing oneself in a Court or quasi-judicial proceeding is commonly an intimidating experience. Tribunals should, within the bounds of fairness to witnesses and other parties, avoid interfering too early or too often, lest an SRL entirely lose confidence and give up. Scolding Cosentino on his first attempt at a question in cross-examination was unnecessary and unfortunate. To Cosentino's credit, he responded courteously to the Chair and soldiered on.

[80] There followed several other instances of what I find to be inappropriate interference by the Chair in Cosentino's cross-examination of McPherson. As discussed in further detail below, I find that those interferences, even if well-intentioned, reflected a lack of understanding of the methods and purposes of cross-examination.

*c. Second Improper Interference with Cross-Examination*

[81] Cosentino questioned McPherson about why she had been selective in which shift schedules she had included in her materials. McPherson gave her explanation and Cosentino attempted to follow up, but was not permitted to do so. The Chair interrupted in the absence of an objection and again permitted McPherson to add a gratuitous remark:

> Q: Okay. But it would suffice to say based on what I showed you, based on the schedules that we've had for the past 10 months, the schedule did shift from here to there. It wasn't all dramatic all at once?

The Chair: The schedules speak for themselves.

Cosentino: Okay.

A: Thank you. [spoken by McPherson]

[82] There was no legal basis to disallow this reasonably formed and useful cross-examination question. Characterizing facts and attempting to compel the witness to agree, or risk looking discreditable by resisting reasonable propositions, is a core technique of cross-examination. Cosentino was entitled to put a characterization of the shift schedules to McPherson.

[83] Moreover, by stating that the schedules "speak for themselves", the Chair gave the impression that she had already made up her mind about what the schedules stood for and/or was shielding the witness from questions that later could show she had been unfair or inaccurate in her answers. A trier of fact should avoid asserting an interpretation that forecloses a line of cross-examination: **Schmaltz** at para 36.

[84] This erroneous intervention was made worse by the fact that McPherson had been asked the following question during examination in-chief:

Q: So it's your contention that you are actually being scheduled for less and less hours?

A: I was being scheduled for less hours, and is also being cut which you can see in Exhibit 3 if you want to get though that after [sic].

[85] Thus, McPherson was allowed to characterize the schedules, through a blatantly leading question from Commission counsel, whereas Cosentino's attempt to challenge her characterization was curtailed by the Chair of her own motion.

*d. Third Improper Interference with Cross-Examination*

[86] During cross-examination going to mitigation of damages, Cosentino asked the simple question: "and do you need an ROE to get a job in another establishment?" McPherson responded rhetorically and the Chair directed her to answer the question. Instead, she gave a discursive response, discussing her hardship and mental distress around the time of termination. Cosentino attempted to continue his cross-examination but was cut off:

Q: If I could interrupt. The question asked was, is it necessary to have an ROE, - -

The Chair: No. She answered the question.

Q: Okay. The next question I'd like to ask is that you stated that - - previous [sic] in questioning yesterday you stated that to pay rent, you had to use your credit card to pay your rent, correct?

A: I took cash advances off my credit card to pay my rent, correct.

Q: In that instance, for a three-month period, you didn't find it necessary to seek employment elsewhere?

The Chair: She just told you the reason why she didn't seek employment.

Consentino: M-hm. Okay

> The Chair: Because it's so close in time, it is not accurate to characterize that she didn't find it necessary to seek employment. Please be careful with your questioning. That was not an accurate characterization of what she –
>
> Consentino: Okay.
>
> The Chair: - - literally moments ago finish saying.
>
> [Emphasis added.]

[87] There was no legal basis for this intervention, as confirmed by the lack of any objection by Commission counsel. While McPherson had given an explanation for not seeking another job, Cosentino was establishing a premise – namely having had to live off her credit cards to cover basic expenses like rent – that made her position seem unreasonable, and putting to her the tension between that fact and her not finding it "necessary" to look for work.

[88] Paradigmatically, a cross-examiner is not obligated to accept a witness' self-serving characterization of actions, events, or conduct. Characterizing facts and circumstances in a manner helpful to one's case and seeking the witness' agreement of those characterizations, is a proper mode of cross-examination.

[89] Moroever, an examiner is entitled to return and test, both logically and rhetorically, a central stated component of a witness' evidence. Indeed, effectively undermining a witness' initial position often will require repeated return to the issue. Had Cosentino continued to put to McPherson further factual premises that were in tension with her explanation for not looking for another job, he would have been entitled to repeatedly re-ask a question amounting to: "*and in those circumstances, you still didn't find it necessary to seek other employment*?"

[90] Well-executed cross-examination often includes this form of repetition-cycle, in which the plausibility of a witness' previous evidence is chipped away with proven contradictory facts, one at a time, straining on the witness' credibility if she continues to adhere to her previous, and increasingly discredited, explanation.

[91] Finally, the Chair's interjection also left the impression that McPherson's explanation of her decision not to look for other work had been immutably established and accepted. A court or tribunal should not intervene in a manner that effectively shuts down a viable line of cross-examination and suggests a resolution to a point of tension in a witness' evidence that is favourable to one party: ***Schmaltz*** at para 38.

*e. Fourth Improper Interference with Cross-Examination*

[92] Cosentino sought to cross-examine McPherson on whether she had been in school during her time at LDV, presumably to establish limits on her availability for work. McPherson's answers were inconsistent. She first said she did not attend school in 2013, but then said she took a night course at the South Alberta Institute of Technology. Trying to gain clarity on the point, Cosentino asked:

> Q: Okay. Just to be clear. Very good. You did not tell me in 2013 the reason you can work part-time was because you were in school?
>
> The Chair: You're giving evidence.
>
> Consentino: I'm giving a question.

The Chair: No. That was giving evidence. You did not tell me in 2013, et cetera, et cetera.

[93] Both the written transcript and the audio make clear that Cosentino was asking a properly formed leading question. He re-asked the question with a slight wording change and it was answered, but there was no reason for the interruption and correction. From the audio record, it is obvious that Cosentino was working hard to gather his thoughts and remain focused in the face of frequent interruptions during what was already a stressful and unfamiliar process. While this interjection had no substantive impact, it unnecessarily burdened the SRL and incorrectly indicated to him that he was "doing it wrong", when he was not.

*f. Fifth Improper Interference with Cross-Examination*

[94] Cosentino then attempted to cross-examine McPherson on whether her yoga instruction commitments interfered with daytime work availability. She denied telling him that she was unavailable for lunch shifts, but agreed that she had been a yoga instructor in 2014. Cosentino asked whether she had a job teaching yoga and McPherson said she did not, because the classes she was instructing were free. That led to the following exchange:

Q: Okay. You mentioned that the reason you weren't available for lunch shifts in May was because you were a yoga instructor, correct?

A: That is incorrect.

Q: But you -- didn't you mention something about being a yoga instructor in 2014?

A: I was a yoga instructor in 2014.

Q: And, I'm sorry. Again, did you not say you were unavailable -- you -- sorry -- I'm asking the same question. Did you having a job as a yoga instructor interfere with you working lunch shifts at LDV in 2014?

A: No, it did not.

Q: Okay. I don't have any transcripts, but according to my notes, you were working as a yoga instructor, but you were not -- it was a free service. Is that true?

A: In 2014, I taught free karma yoga.

Q: And would that not mean that you were a yoga instructor?

A: I'm not sure how to answer that. As you study and you have a certificate. I have four different certificates in four different types of yoga, so I would consider myself a yoga instructor. Was I employed as a yoga instructor during that time? Absolutely not. Did I teach two or three karma free classes across the street from your business at Lila, which is no longer there? Yes, I did.

Q: Okay. So that was my question. I didn't ask if you were employed. What I asked was -- and I didn't ask if you were taking compensation. The question I asked was, <u>were you a yoga instructor, and did that interfere with lunch shifts at LDV Pizza Bar</u>?

[Emphasis added.]

[95] Rather than answer the question, McPherson answered what she anticipated was Cosentino's argument underlying the question:

> A: I have been a yoga instructor since 2011. I believe what you're after was my statement that the lunch shifts did not always work because I had midwife's appointments because I was pregnant, not that I was teaching yoga. It was the midwife's appointments, so let me clarify that for you. [Emphasis added.]

[96] While the transcript does not capture the tone of this non-answer, the recording does. The phrase "so let me clarify that for you" was distinctly inflected. Where a witness gives a sharp, non-responsive answer, the cross-examiner is entitled to re-establish control by re-asking the evaded question. In his own way, Cosentino attempted to do exactly that, without arguing with the witness or rising to the bait in the previous response:

> Q: Okay. Very good. But you -- you did -- you were a yoga instructor --
>
> The Chair: Mr. Cosentino, we have established that.
>
> Consentino: Okay.
>
> The Chair: Seven times.

[97] The audio recording captures an audible sigh from the Chair between the words "Mr. Cosentino" and "we have established…that seven times." Rather than caution the witness to be responsive, the Chair expressed hyperbolic frustration with Cosentino, who was attempting a polite cross-examination of a combative witness. The modest repetition in his "re-centering" question was proper. Where a witness goes far afield in the process of not answering a simple question, the cross-examiner is entitled to repeat the last question, including potentially reconfirming a series of premises leading to it. This is good cross-examination practice, can prove highly revelatory in terms of the witness' testimonial credibility, and should not be obstructed by the judge or tribunal hearing the matter.

[98] When Cosentino responded to the Chair's rebuke by pointing out that there's "a little discrepancy", the Chair went looking for the complaint form, had it put up on the screen, and then called a 20-minute recess, ostensibly to allow Cosentino to prepare further questions. Notably, this would also have left the witness, in mid-cross-examination, with a lengthy break to review her prior statements.

[99] Even if well-intentioned, this takeover of the cross-examination process, coupled with giving the witness a lengthy pause with a key document in front of her, interfered with the flow of the examination and would have assisted the witness in staying consistent with the document on which she was being impeached.

*g. Sixth Improper Interference with Cross-Examination*

[100] After the hearing recommenced, Cosentino questioned McPherson on her previous evidence that her volunteer yoga teaching did not conflict with taking daytime shifts. Reading a portion of the Request Email to her, Cosentino asked:

> Q: So to reiterate, there were yoga classes that interfered with daytime at LDV, correct?

The Chair: So Mr. Cosentino, here is the thing.

Consentino: M-hm. It's questioning. Sorry. I - - I - -

The Chair: No. I want - - I would like to give you - - use this opportunity to let you know what is appropriate and what is not appropriate. You are characterizing the teaching of yoga classes as interfering with the shift, and Ms. McPherson is saying it didn't interfere with my shifts. So what I would ask you to do is say - - is to ask questions without characterizing them as interfering with her shifts because you're not going to get a response you are happy with.

[Emphasis added.]

[101] While the Chair perhaps was attempting to be helpful with this intervention, it was again driven by a fundamental misunderstanding of the nature and use of cross-examination. It is entirely proper, and potentially highly probative, for the examiner to put his case to the witness. Indeed, this is the essence of the principle of fairness animating the "rule" in ***Browne v Dunn***, (1893) 6 R 67 (UK HL), which the Tribunal used to aid in rejecting LDV's evidence that McPherson was a poor employee: ***R v Werkman***, 2007 ABCA 130 at para 7; ***Chandroo c R***, 2018 QCCA 1429 at para 13.

[102] Putting one's case to an opposing witness is done with no expectation that the witness will agree. Where the characterization put to the witness is both helpful to the examiner's case and also fair, this is a no-lose situation. Either the witness accepts the characterization or risks losing credibility by resisting a true but unhelpful point. Either way, the question is proper.

[103] Contrary to the Chair's rationale for her intervention, if the examiner can otherwise prove the proposition being put forward in the question, the witness' *disagreement* allows the examiner to argue that their evidence is less worthy of belief, for want of fairness and objectivity. Cosentino was entitled to ask this question, have it answered, and make what use he wished of that answer in his submissions.

*h. Seventh Improper Interference with Cross-Examination*

[104] Cosentino read to McPherson a passage from her complaint and asked:

Q: So in this letter, in this complaint letter, you are basically saying that you would have worked lunch shifts if it was lucrative enough for you to work?

[105] This question, properly put to the witness, was a key facet of LDV's defence – namely that her real complaint about the shift changes was that she would make less money and it had nothing to do with accommodating her pregnancy. Without an objection from Commission counsel, the Chair again interrupted.

The Chair: I - - so what you can say is – the way you can ask the question you are asking is, Are you saying that you would have worked lunch shifts if it was lucrative enough for you? I anticipate Mr. Foster will object and say that is a hypothetical. That didn't occur. You can ask the question if you like, but it is hypothetical. What I need are facts and evidence. It is a hypothetical, but if you want to ask the question, you can do so.

[106] Again, the Chair was likely trying to be helpful, but ended up interfering with proper cross-examination. Cosentino was not asking about McPherson's general state of mind about working the shifts, but the purport of what she had written in her complaint. These are similar but crucially different questions. A question about a previous statement constrains the witness' answer in a way that one about their general intentions and feelings does not. The original question was proper and better. It was not hypothetical. An interpretation of the contents and meaning of the witness' own contemporaneous document was put to her for agreement. This was proper and the Chair should not have intervened.

*i. Quantity of Interruptions*

[107] The Chair intervened a total of 39 times during Cosentino's cross-examination of McPherson, which ran for less than two hours. Fifteen of the interventions had at least somewhat of a corrective tone. That is a significant volume of negative disruption.

[108] Not all of the Chair's interventions were corrections of Cosentino and the majority were not objectionable. Indeed, inexperienced parties may require considerable guidance and assistance to shepherd them through the litigation process. There comes a point, however, where interventions begin to weigh disproportionately in the proceeding. As the Federal Court of Appeal observed in ***R v Littler***, [1978] FCJ No 124 at para 62, "[i]t is undoubted that excessive judicial interruption inevitably weakens the effectiveness of examination and particularly cross-examination."

**3. Conclusion on Bias/Unfairness**

[109] Judges and tribunal Chairs have an obligation to keep matters on track and to manage proceedings effectively, by assisting parties through difficulties in examination and evidence. Their interventions, however, must remain impartial. As the Court of Appeal held in ***R v WM***, 1995 ABCA 244 at para 56:

> While a trial judge need not be a sphinx, and while justice and fairness may well require judicial intervention, this should be done at a time and in a manner which does not distort the fine balance required if there is to be a fair trial from the perspective of both the accused and the Crown.

[110] The nexus between impartiality and the need for limited interference in the examination of witnesses was concisely expressed by the Ontario Court of Appeal in ***Majcenic v Natale***, [1968] 1 OR 189 (ON CA) at p 205, where it held that:

> When a Judge intervenes in the examination or cross-examination of witnesses, to such an extent that he projects himself into the arena, he of necessity, adopts a position which is inimical to the interests of one or other of the litigants. His action, whether conscious or unconscious, no matter how well intentioned or motivated, creates an atmosphere which violates the principle that "justice not only be done, but appear to be done". Intervention amounting to interference in the conduct of a trial destroys the image of judicial impartiality and deprives the Court of jurisdiction.

[111] Intervention in cross-examination is particularly fraught. Cross-examination is "the ultimate means of demonstrating truth and of testing veracity... [and] ...is fundamental to providing a fair trial": ***R v Colling***, 2017 ABCA 286 at para 18, leave to appeal dismissed 2018

SCC 23 ("***Colling***"), citing ***R v Osolin***, [1993] 4 SCR 595 at 663. As our Court of Appeal stated in ***Colling*** at para 21:

> Interjections during the cross-examination of the prosecution's witness may amount to trial unfairness, either actual or perceived. The test to determine whether such interventions compromised trial fairness is an objective one. "The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial": ***R v Valley***, [1986] OJ No 77, 26 CCC (3d) 207 at 232, leave to appeal to SCC dismissed [1986] SCCA No 298 (QL).

[112] Much of the value of cross-examination lies in the process itself and a study of the witness' reaction to it. Experiencing the aural, visual, and energetic components of the exchange between examiner and witness is what gives the first-instance trier of fact a unique position and advantage in judging a case: ***R v REM***, 2008 SCC 51 at paras 48, 54. The testimonial factors observed first-hand, such as responsiveness, fairness, and objectivity, along with their converses – evasiveness, exaggeration, and partisanship – are indispensable measures in the assessment of credibility.

[113] Cross-examination should be allowed to flow uninterrupted to the furthest extent possible. A trial judge may be required to stop abusive repetition or assist a floundering SRL to get back on track. However, with the exception of interventions to maintain fairness and for breaks, interruptions to cross-examination should be kept to a minimum. As Major and Fish JJ wrote for the Supreme Court in ***R v Lyttle***, 2004 SCC 5 at para 1:

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. [Emphasis in original.]

[114] Regrettably, I conclude that the Chair's interventions in this case, coupled with the unrestrained receipt of bad character evidence, rendered the proceeding unfair and created a reasonable apprehension of bias. As in ***R v Quintero-Gelvez***, 2019 ABCA 17 at paras 13-14, the interventions of the Chair impeded the responding party's:

> …ability to cross-examine on important inconsistencies in the complainant's evidence and otherwise test the reliability of that evidence….
>
> …[and] reveals a significant number of situations in which the trial judge prevented defence counsel [in this case the SRL] from asking certain questions without having first received an objection to them from [opposing] counsel..

[115] The Chair's interventions also deprived the Tribunal of a full opportunity to observe and test the credibility of McPherson's responses when faced with tensions in her evidence. Disinterest in this exercise, together with comments suggesting that certain points favourable to McPherson had been immutably established, contributed to a perception that her evidence had already been accepted. The net result in this case finds resonance in the words of Brown JA (as he then was) in ***Schmaltz*** at para 48, where the intervention by the trial judge:

> …demonstrated that he was not listening to or understanding some of the inconsistencies presented by defence counsel. The cumulative effect of the trial judge's interventions was that he frustrated, to a significant and unwarranted degree, defence counsel's strategy to test the complainant's credibility. This would lead a reasonable, well-informed and right-minded observer to conclude that the appellant was not able to make full answer and defence. The interventions therefore led to trial unfairness.

[116] As an SRL, Cosentino unsurprisingly struggled somewhat to get his case out through cross-examination. His attempts were hampered by the Chair's interventions and repeated corrections, many of which were unwarranted and unbidden. Combined with the attacks on his character, and McPherson's unrestrained commentary about his objections, Cosentino did not experience a fair hearing.

[117] While the enumerated incidents, considered in isolation, may have been of no moment, their overall effect, in a hearing lasting less than two full days, was to tip the proceeding into unfairness: ***R v Stewart*** (1991), 62 CCC (3d) 289 (ON CA) at p 320 per Doherty JA. An objective and informed observer present throughout the proceeding would reasonably have considered that the hearing was not fair: ***Schmaltz*** at para 21.

[118] I also conclude that such an observer would have been left with a reasonable apprehension of bias. As Brown JA (as he then was) noted in ***Schmaltz*** at paras 16-17, bias is a subspecies of unfairness, going to the impartiality of the tribunal, whereas unfairness arising from interference in examination concerns the conduct of the proceeding. The problems identified above go to the latter of these concerns. However, the combination of unjustified interruptions of cross-examination in the absence of objections, the double-standard on characterization of evidence, rulings and comments which made it sound as though McPherson's evidence had been definitively accepted, the permission of McPherson's snide remarks in response to rulings against Cosentino, the Chair's impatient admonishment of Cosentino, and the repeated admission of bad character evidence against him without comment, would lead an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that the Tribunal was biased against LDV and Cosentino: ***Malton v Attia***, 2016 ABCA 130 at paras 81, 83.

### D. General Damages

[119] Damage awards in human rights proceedings are entitled to substantial deference: ***Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission)***, 2017 ABQB 215 at para 45. Applying the appellate standard of review now mandated by ***Vavilov***, this Court cannot interfere with a damage award simply because it would have come to a different conclusion: ***Woelk v Halvorson***, [1980] 2 SCR 430 at p 435. Interference is justified only where the decision maker: (1) made an error of principle or law; (2) misapprehended the evidence; (3) erred in finding there to be evidence on which to base a conclusion; (4) failed to consider relevant factors, or considered irrelevant factors; or (5) made "a palpably incorrect" or "wholly erroneous" assessment of the damages: ***Naylor Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 at para 80; ***Booster Juice Inc v West Edmonton Mall Property Inc***, 2019 ABCA 58 at para 10.

[120] My conclusion that this proceeding was unfair and tainted by an apprehension of bias precludes a meaningful review of the general damages award. That award was predicated on the

Tribunal's acceptance of McPherson's evidence that this incident left her with long-term damage to her self-esteem. This finding, combined with the financial stress caused to McPherson in the leadup to the arrival of her baby, may have justified the relatively large award.

[121] On the other hand, the quantum of the general damages award is far from intuitive given the evidentiary record. McPherson neither lost her career nor suffered a setback in it. She lost a part-time waitressing job she had held, along with other jobs, for less than a year. She did not lose work "which was an important part of her life and sense of identity": ***Sunshine*** at para 193. Rather, she testified that she went on to work as "a supervisor in a five-star hotel here in Calgary".

[122] The Tribunal's acceptance of McPherson's impact evidence hinged on its finding that she "did not embellish or inflate circumstances in her testimony." That finding cannot stand in the face of an apprehension of bias in her favour. As counsel for LDV ably argued on appeal, this conclusion is in tension with a number of aspects of McPherson's evidence. The Tribunal's reasons failed to grapple with or resolve those tensions: ***Vavilov*** at para 128. Therefore, the quantum of the award cannot be confirmed on this appeal.

[123] Conversely, it would be unfair to McPherson to assess damages without allowing her the opportunity to have her impact evidence assessed, and potentially accepted, by a different tribunal. Therefore, general damages in this case will have to be assessed at a future hearing.

## VII. Remedy

[124] The Supreme Court has held that an unfair administrative proceeding is a nullity. In ***Cardinal v Director of Kent Institution***, [1985] 2 SCR 643 at 661, Le Dain J said:

> ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing. [Emphasis added.]

[125] Similarly, in ***Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)***, [1992] 1 SCR 623 at 645, the Court stated:

> If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. [Emphasis added.]

[126] Applying this principle, the Court of Appeal has held that "where a reasonable apprehension of bias has been demonstrated, all decisions and orders made during the trial are rendered void": ***R v LaFramboise*** [1997] 200 AR 75 (CA) at para 22.

[127] Therefore, notwithstanding that there was evidence upon which discrimination properly could be found, procedural unfairness and a reasonable apprehension of bias require that the decision be set aside and a new hearing ordered: ***Saskatoon Co-Operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union***, 2016 SKCA 94 at para 34.

[128] The appeal is allowed and the matter remitted to the Tribunal for a new hearing before a differently constituted panel, pursuant to section 37(4)(b) of the *AHRA*.

Heard on the 27th day of May, 2021.
**Dated** at the City of Calgary, Alberta this 7th day of January, 2022.

**N.E. Devlin**
**J.C.Q.B.A.**

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