COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *J.J. v. School District No. 43 (Coquitlam),* 2011 BCCA 343

Date: 20110810
Docket: CA037401

Between:

J.J.

Appellant
(Petitioner)

And

Board of School Trustees of School District No. 43 (Coquitlam) and Canadian Union of Public Employees, Local 561

Respondents
(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, July 21, 2009
(*J.J. v. School District No. 43 (Coquitlam),* 2009 BCSC 984, Vancouver Docket No. S088404)

Counsel for the Appellant:	J.C. MacInnis
Counsel for the Respondents, CUPE, Local 561:	B.L. Quinn
Place and Date of Hearing:	Vancouver, British Columbia December 17, 2010
Place and Date of Judgment:	Vancouver, British Columbia August 10, 2011

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] This is an appeal from an order refusing to extend time within which the appellant may apply for judicial review of a decision of the Human Rights Tribunal dismissing a complaint on a "no evidence" motion, and a decision affirming that result.

[2] J.J. is a complainant against her former employer, the Board of School Trustees of School District No. 43 (Coquitlam) and the Canadian Union of Public Employees, Local 561 under the *Human Rights Code*, R.S.B.C. 1996, c. 210. Her complaint against the Union was dismissed December 3, 2007, on the Union's "no evidence" motion, a decision subsequently confirmed by the Tribunal on June 13, 2008 when it dismissed her application to re-open or reconsider its earlier decision. J.J.'s complaint against the School Board proceeded on the merits. A decision in her favour against the School Board was made by the Tribunal on September 30, 2008 and certain remedies were ordered.

[3] J.J. disputes the dismissal of her complaint against the Union and disputes the adequacy of the findings against the School Board on the issue of discrimination and remedy. Her petition for judicial review challenging the disposition of her complaints against the Union and the School Board, however, was not filed until December 2, 2008. In respect to the decision and affirmation of the decision dismissing J.J.'s complaint against the Union, J.J. was out of the time limited by s. 57 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. That section requires a judicial review application to be brought within 60 days of the decision that is

impugned. As a result, s. 57(2) required J.J. to obtain an extension of time for making the application:

> 57(2) Despite [the 60 day limitation period] either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

[4] Mr. Justice Pitfield found that J.J.'s delay in filing the judicial review petition was adequately explained in that she did not understand the decision dismissing her complaint against the Union and the decision affirming the first decision were final, and not interlocutory to the continuing proceedings on her complaint against the School Board. Nonetheless the learned judge declined to extend the time for the petition on the basis there was no reasonable prospect that a court would interfere with the Tribunal's decisions dismissing her complaint against the Union, that is, there were not "serious ground for relief" as required by s. 57(2). Consequently, the judge ordered the Union be removed as a party.

[5] J.J. appeals from the order denying her an extension of time and removing the Union as a party to her petition. She frames her ground for appeal thus:

> The learned ... judge erred in failing to consider whether "serious grounds for relief" existed by reference to a standard of correctness.

[6] J.J.'s main contention is that the judge characterized the Tribunal's decisions on the no evidence motion as discretionary, leading him to conclude the standard of review on her petition, if it were allowed to proceed, would be that of "patent unreasonableness" pursuant to s. 59(2) of the *Administrative Tribunals Act*. She says the Tribunal's conclusion of no evidence was a conclusion of law, and thus

judicial review of it would be considered on a standard of correctness. On that standard, she says, there are serious grounds on which she could argue the decision that there was no evidence to support her complaint against the Union was not correct, and likewise the decision not to re-open her complaint against the Union.

[7] The Union says the judge was right in holding that the decisions on the no evidence motion were discretionary and were based upon findings of fact that are not unreasonable. In any event, it says even if the judge erred in the standard he applied to his analysis of the basis for judicial review and a standard of correctness should apply, J.J. has not demonstrated that the decision is incorrect, or that she has serious grounds to argue it is not correct. Untangling that double negative, the Union submits the Tribunal was clearly correct: there was no evidence to support her complaint against the Union of discrimination.

[8] I will turn now to the circumstances of the case.

[9] J.J. was employed by the School Board from 1996 to 2005 as a casual painter, and generally worked from April to October. She was a member of the Union and covered by the terms of the collective agreement between the School Board and the Union. Her shop steward was a full-time painter who filled in for the Painter Supervisor when the Painter Supervisor was not at work.

[10] J.J.'s complaint against the Union arises from events from 2002 onward. She alleges that the shop steward harassed her, both by what the Tribunal described as "traditional" sexual harassment and by treating her "in a humiliating and belittling manner because she was the only female painter". She alleges that when she

complained about this behaviour to her supervisor, her terms and conditions of employment changed in that she was told she no longer could be in charge of jobs because a casual employee could not be in charge of other casual employees, and she was informed she had no seniority because casual employees did not accumulate seniority.

[11] J.J. alleges that in August 2005, she was so upset and frustrated after a meeting of the painters that she submitted a letter of resignation. When she sought to retract her resignation, she was provided a letter of expectation instructing her that she would not assume a supervisory role over other workers unless specifically requested to do so by either her Painter Supervisor or management. J.J. returned to work, and at the end of the season sought assistance from the Union President on the issues of a rotation list and appointment to temporary positions, and the scope of authority of casual employees.

[12] J.J. was not called back to work in April 2006. By then two other casual workers had been asked to work full-time. J.J., through the Union, filed a grievance, which was resolved by the Union on the basis she would be hired back for the season if she signed a letter agreeing that she understood employment was seasonal, she was not guaranteed to be re-hired, and she would not assume the role of a supervisor. J.J. refused to sign the letter and has not been employed by the School Board since that time.

[13] J.J. complained against the School Board, saying she was discriminated against by gender in the selection of workers for work assignments and in excluding her from casual employment in 2006. She complained against the Union, saying it

had discriminated against her by inadequately investigating her allegation that the shop steward had harassed her and by failing to adequately support her complaint that the School District did not recognize accumulation of seniority for casual workers from one year to the next, that it prohibited casual workers from assuming supervisory responsibility on a job, and that it wrongly failed to re-hire her in 2006.

[14] The Tribunal considered the elements of discrimination under ss. 13 and 14 of the *Code*: (1) that she is a member of a group protected on an enumerated ground; (2) that she experienced some adverse effect in her employment or membership in the union; and (3) that the protected ground was a factor in the adverse treatment. It found, for the purposes of the application, J.J. had satisfied the first two requirements and it turned its attention to the third requirement – that there be a nexus between the alleged adverse effect and her gender. On the aspect of the complaint that she had been harassed, the Tribunal said:

> [123] ... her allegations against [the shop steward] were highly intertwined with her more general concerns relating to "in charge" status and casual seniority. J.J. testified that she expected [the Union president] to provide her with advice about her concerns. On the face of the letter, however, and taking into account subsequent events, I cannot find that there is a reasonable basis in the evidence on which I could conclude that the Union breached the Code as a result.
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> [124] First, J.J. stated in the letter that the purpose for writing it was not to "name names". Second, she stated that it was for [the president's] eyes only. Third, when J.J. discovered that [the president] had been asking other painters questions about some of the allegations in the letter, she became very upset. She stated in her evidence "I had not asked him to conduct an investigation".
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> [125] Further, the evidence indicates that the Union did subsequently address J.J.'s concerns with respect to the harassment issue when she made it clear that she wanted this issue addressed.

> [126] ... on the evidence before me, the Union appropriately advised J.J. of the collective agreement provisions around filing a harassment grievance, and all the potential consequences of doing so.
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> [Emphasis added.]

[15] The Tribunal then addressed the issue of representing J.J. on her rights under the collective agreement and her grievance:

> [128] The evidence before me discloses that J.J. and the Union had very different views about what the collective agreement rights of casual painters were. However, there is no reasonable basis in the evidence before me which would support a conclusion that any part of the reason for this difference of opinion was J.J.'s sex. Rather, the evidence points to the conclusion that the Union was of the view, from at least April 2005 onward, that casual painters had no accumulated seniority, and that casual painters were not properly in charge of jobs, in a supervisory sense.
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> ...
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> [130] ... the Union's position [for seniority] pre-dated any request by J.J. for assistance, or any knowledge of her concerns. The Union's position was consistent throughout. There is no reasonable basis on the evidence from which I could conclude that J.J's sex influenced the Union's position with respect to casuals being in charge, or the accumulation of seniority among casuals working on a seasonal basis.
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> ...
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> [135] The Union and the School District negotiated the collective agreement. The Union had a view of the meaning of the provisions of the collective agreement, and on the practice of the parties to the collective agreement with respect to the issues raised by J.J. The fact that the Union's view differed from J.J's understanding of the situation does not lead to a finding that the Union discriminated against her on the basis of sex. Specifically, there is no reasonable basis in the evidence before me that J.J.'s sex was any reason for the positions taken by the Union in this regard.
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> [136] J.J. argues that, if she had been a man raising the concerns she had, she would not have been treated in the same way. She argues that, when people ignore you over and over again the only reasonable conclusion is that you are being discriminated against. While I do not doubt that she sincerely believes this to be the case, there is no reasonable basis in the evidence on which I could make a finding that there is a nexus between J.J.'s gender and the adverse treatment which she alleges. I therefore allow the Union's no evidence motion.
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> [Emphasis added.]

[16] In addressing J.J.'s application for an extension of time, the judge addressed the criterion that there be "serious grounds for relief" in these terms:

> [21] The third ground on which CUPE opposes the granting of leave is the absence of serious grounds for relief. In assessing this claim, the court must be careful not to embark upon the judicial review that will proceed in the event that leave is granted. At the same time, because s. 57(2) of the *Administrative Tribunals Act* requires the court to be satisfied that there is a serious ground for relief, the court cannot ignore the tribunal's decision and the process and reasoning which led to the result. The court must consider whether there is a reasonable prospect or likelihood that the petition will succeed: *Andrews v. British Columbia (Labour Relations Board)*, 2005 BCSC 746, at para. 4.
>
> [22] Decisions of the HRT are not subject to a privative clause. Therefore, when considering the prospect of success on a judicial review, the court must have regard for s. 59 of the *Administrative Tribunals Act* ...
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> [23] The petitioner says that there are substantial issues that warrant review. She says that the HRT erred in dismissing the claim against CUPE because there was a reasonable basis in the evidence upon which a conclusion could be reached in her favour against CUPE; the decision dismissing the claim against CUPE was inconsistent with the finding that the School District had discriminated against her; the findings of fact recited in the ruling did not support the "no evidence" determination; and the evidence before the HRT did not support the "no evidence" ruling.
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> [24] Each ground of complaint is premised on the fact that various findings of fact made by the HRT were unreasonable, and the discretionary decisions made by it were patently unreasonable. I have reviewed the extensive reasons provided by the HRT on both the application to dismiss the complaint against CUPE and the application to reopen that complaint. I cannot conclude that there is any reasonable likelihood that the petitioner will persuade a court in the event of judicial review that a finding of any material fact was unreasonable because there was no evidence to support it, or that either decision of the HRT was patently unreasonable based upon the findings of fact. The decision to grant the no evidence motion was discretionary: *Zellers Inc. v. Naser*, 2007 BCSC 243. Likewise, the decision to dismiss the application to reopen was discretionary. Nothing recited in the petition itself, in argument, or in the reasons themselves suggests that in making its decisions, the HRT has offended any of the factors described in [s. 59(4)] of the *Administrative Tribunals Act*.
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> [Emphasis added.]

[17] Having found the Tribunal's decisions were discretionary, the judge explained why he considered there was not sufficient merit to a submission the decisions were

patently unreasonable so as to justify the extension of time to apply for judicial review:

> [25] The complaints against CUPE, as opposed to those against the School District, were narrow. The petitioner claimed that CUPE failed to consider her complaints against the shop steward because she was a woman. She claimed that her union had permitted discriminatory practices to be incorporated into the collective agreement between CUPE and the School District. The HRT addressed both complaints in its reasons.
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> [26] Following an extensive review of the evidence, the HRT concluded that the union did address the issue of harassment when the petitioner made it clear she wanted that done, and that the union advised the petitioner of the provisions in the collective agreement pertaining to the filing of a harassment grievance and the potential consequences of doing so. The mere fact that someone else might have come to a different conclusion does not make the finding of fact unreasonable or the final decision patently unreasonable.
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> [27] Likewise, I cannot conclude that there is any reasonable prospect that a court would find grounds on which to interfere with the HRT's decision that CUPE did not omit to deal with the School District on the matters of casuals in charge or the accumulation of seniority because of her gender.
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> [28] Finally, I cannot conclude that there is any prospect that a court would interfere with the HRT dismissal of the petitioner's application to reopen her complaint. The documents which provided the basis for the petitioner's application were already in evidence before the HRT. The petitioner appears not to have referred to them in the course of the proceeding. I agree with the HRT's observation that any concern regarding any oversight in respect of that evidence should be addressed on a judicial review, and not by way or reopening. I cannot find any fault with the decision to dismiss the application to reopen.
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> [29] There is nothing in the record or the reasons to suggest that the petitioner was provided with inadequate direction in relation to her complaints by way of pre-hearing conferences, a full hearing, and the opportunity to make complete submissions to the tribunal.
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> [30] In the result, I am satisfied that there is insufficient merit to any of the petitioner's complaints to warrant a judicial review of either decision.

[18] The appellant contends the judge erred in holding the Tribunal's decision to grant the no evidence motion was discretionary and so attracted a standard of patently unreasonable. She contends that the finding there was "no evidence" to support her conclusion is a conclusion of law, such that the Tribunal was bound by s. 59 of the *Administrative Tribunals Act* to be correct.

[19] The answer to the issue posed requires a review of the scheme under which the Tribunal was acting, the law as it relates to "no evidence" motions, and the Tribunal's approach to the motion.

[20] The Tribunal is governed by its constating statute, the *Human Rights Code.* The *Code* defines "tribunal" as the British Columbia Human Rights Tribunal and "member" as a person appointed as a member of the Tribunal. Hearings are conducted by a member, and the member's decision becomes the decision of the Tribunal. Section 32 of the *Code* provides that s. 59 of the *Administrative Tribunals Act* applies. Section 59 of the *Administrative Tribunals Act* establishes the standard of review:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
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> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> [Emphasis added.]

[21] The *Human Rights Code*, in the tradition of administrative tribunal legislation, gives the Tribunal broad authority over its own procedure and authorizes members to make certain decisions, subject to the always present requirement that it comply with the principles of administrative law, including the rules of procedural fairness:

> 27.2 (1) A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.

> ...
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> 27.3 (1) The tribunal may make rules respecting practice and procedure to facilitate just and timely resolution of complaints.
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> ...
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> (3) In order to facilitate the just and timely resolution of a complaint, a member or panel, on their own initiative or on application of a party or an intervenor, may make any order for which a rule could be made under subsection (1) or (2).

[22] The *Human Rights Code* provides expressly for dismissal of a complaint at any time:

> 27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
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> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
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> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
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> (c) there is no reasonable prospect that the complaint will succeed;
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> (d) proceeding with the complaint or that part of the complaint would not
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> (i) benefit the person, group or class alleged to have been discriminated against, or
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> (ii) further the purposes of this Code;
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> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
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> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
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> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

[23] The issue is the character of the Tribunal's decisions that J.J. seeks to impugn, be they discretionary as the judge found, or questions of law as J.J. contends. As the second decision not to re-open the first decision appears to me to be squarely within the discretion of the Tribunal to manage its own process, and so

would attract the standard applied by the judge, patent unreasonableness, the balance of these reasons address the first decision in which the complaint against the Union was dismissed.

[24] Throughout the proceedings the Union's application has been referred to by the parties as a "no evidence" motion. By this terminology the analysis has focused upon the application of concepts familiar to criminal and civil law in the context of a trial. The term "no evidence" in courts is also variously referred to, in the criminal law context, as a directed verdict and, in the civil law context, as a motion for non-suit.

[25] In *Roberge v. Huberman,* 1999 BCCA 196 this court considered the law of no evidence motions, as distinct from the law of insufficient evidence motions. Madam Justice Huddart described the indistinct task of a trial judge in a civil trial bound by the *Rules of Court*. She first referred to the settled law of the Supreme Court of Canada in criminal cases, set out in *R. v. Monteleone,* [1987] 2 S.C.R. 154 and its earlier comprehensive decision, *R. v. Mezzo,* [1986] 1 S.C.R. 802, to the effect that in a motion for a directed verdict the issue is, in the words of Justice McIntyre in *Monteleone*, whether "there is before the court any admissible evidence, whether direct or circumstantial, which if believed by a properly charged jury acting reasonably, could justify conviction." She referred as well to Justice McIntyre's approval in *Mezzo* of Lord Cairns' speech in *Metropolitan Railway Co. v. Jackson* (1877), 3 A. C. 193, distinguishing between the roles of the judge and the jury. Mr. Justice Esson, in majority reasons agreeing with the reasons of Madam Justice Huddart, referred to the "no evidence" motion in criminal and civil proceedings, saying:

> [62] The "no evidence" motion is an established aspect of the procedure in criminal trials. Because of the burden on the Crown to prove each element of the charge, and the absence of any burden on the accused, it is essential that the accused have the opportunity to argue "no evidence" before deciding whether to call evidence.
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> [63] That consideration does not apply to civil trials in which each side is required to plead its case and has the burden of advancing its case. Historically, the prevailing view has been that the court should not entertain a no evidence motion in a civil trial unless the defendant elects to call no evidence. Where such an election is made, the distinction between "no evidence" and "insufficient evidence" effectively disappears. All the evidence for both parties being before the court, the evidence can be weighed and a conclusion reached as to whether the plaintiff has discharged the ultimate burden. Thus, the court may be spared the arid and often confusing intellectual exercise of having to decide whether the evidence heard to that point is, as a matter of law, "no evidence". And the parties are spared the risk of a finding of "no evidence" being reversed on appeal and of a new trial being ordered.

[26] It is therefore clear that in civil and criminal trials matters divide into questions of law and questions of fact, flowing from the realities of jury trial work, and whether there is evidence to support the case, colloquially referred to as a "no evidence" motion, is a question of law. The point of contention in the court cases has reduced to the degree of insufficiency required to permit a judge to find there is no case to place before the trier of fact. The criteria is narrow, but does require consideration of the content of the evidence and the conclusions that might reasonably be drawn from it. Weight and quality of the evidence, however, are matters for the trier of fact.

[27] J.J. relies upon this legal principle in contending that the "no evidence" motion before the Tribunal was a question of law. She says that consequently the judge was wrong in saying her petition challenged the exercise of discretion by the Tribunal, thereby engaging the patently unreasonable standard of review under s. 59 of the *Act*. She says, further, the Tribunal erred by weighing the evidence and drawing inferences, and she refers to findings made by the Tribunal in its decision of her

complaint against the School Board. J.J. submits some of the findings demonstrate the viability of her complaint against the Union and demonstrate that her complaint against the Union was not bound to fail.

[28] One can understand how it is J.J. considers the Tribunal's decision to dismiss her complaint engages a question of law, because the discussion of the "no evidence" motion has been conducted in terms of court language developed to address the dual legal personalities of judge and jury, each with their distinct roles in criminal and civil trials, and it derives from a legal system in which there is a complete record on which one can assess whether a conclusion of "no evidence" is correct. Indeed, human rights tribunals have adopted the terminology and applied the legal reasoning of courts, as is apparent in *Gerin v. IMP Group Ltd.* (1994), 24 C.H.R.R. D449 at para. 23, referred to by the Tribunal in this case at para. 116:

> Since the evidence is not weighed and assessed, the rejection of the motion does not mean that the complaint will succeed if no further evidence is brought forward, it simply means that this conclusion could be made, not that it ought to or will be made. On the other hand, the "any evidence" standard is probably too low; there must be some reasonable basis on which a conclusion in the complainant's favour could be reached. In this way, some protection is offered to a respondent and, in my judgment, both parties are treated fairly. [Emphasis in original.]

[29] In *Gerin,* the Nova Scotia Human Rights Board of Inquiry noted the difference in approach between a motion of no evidence in a court and before a human rights tribunal, saying in the context of a motion for non-suit:

> [5] A motion for non-suit is a procedural device known in other contexts by a variety of other names, such as a motion for dismissal and a motion for a directed verdict. Unlike civil and criminal proceedings, an inquiry under the *Human Rights Act* is a process that does not have fixed, specific rules to govern its conduct. Rather, each board of inquiry is the master of its own procedure, subject to the over-riding requirement that the board comply with the principles of administrative law.

[30] There followed in *Gerin* a learned discussion of the degree to which, on a no evidence motion in court proceedings, a court can weigh and assess the reliability of the evidence, concluding that the decision-maker should stray only lightly into the evidence. The test this Tribunal took from *Gerin* on the application before it was stated at para. 118 of its decision:

> This is the test I will apply in considering the Union's no evidence motion. I must consider if there is a reasonable basis in the evidence upon which a conclusion could be reached in J.J.'s favour as against the Union. In order to make this assessment, I am required to review the entirety of the evidence led by J.J.

[31] With respect to all, it seems to me that the formality of a "no evidence" motion in court is not completely transferrable to proceedings before this administrative tribunal. First, I observe that the formal concept of "no evidence" or "non-suit" is of little assistance in a review process where there is no transcript of the proceedings. While the Human Rights Tribunal writes descriptive decisions recounting the evidence addressed, I do not consider it is safe to approach a "no evidence" ruling on the same standard as if it were a court, absent the ability to fully appreciate the evidence that has been adduced.

[32] Second, and more substantively, it seems to me to be unnecessary, and antithetical, to the scheme of the *Code* to import court procedure and tests into proceedings before the Tribunal. I have earlier replicated ss. 27.2 and 27.3. Those sections affirm the Legislature's intention that the tribunal be freed from the strictures of court procedure and the rules of evidence, provided only, of course, that the Tribunal keep to its legislative mandate and comport itself within the rules of natural justice and procedural fairness. It seems to me that the Tribunal, in selecting the test

it would apply to the Union's motion brought at the conclusion of the complainant's case, was exercising its discretion to regulate its own process.

[33] One may ask, however, whether, the Tribunal's conclusion based upon the test it applied ("is there a reasonable basis in the evidence upon which a conclusion could be reached in J.J.'s favour as against the Union") is a conclusion of law. Here we have some help from s. 27(1)(c) of the *Code.* Section 27(1)(c) permits the Tribunal "at any time after a complaint is filed and with or without a hearing" to dismiss all or part of a complaint, "when there is no reasonable prospect that the complaint will succeed". The Union says the decision we are concerned with was not made under this section because it was made mid-hearing, but that it is akin to a s. 27(1)(c) decision. I would go further. On the basis of the test that was applied by the Tribunal, I would say this decision is a species of decision under s. 27(1)(c). The plain language of the section permits dismissal "at any time", thereby to avoid the full expenditure of time and financial resources on a complaint where the test for dismissal is met. There is, in my view, no space between the test of "no reasonable prospect that the complaint will succeed" in s. 27(1)(c) and the test applied here by the Tribunal, no "reasonable basis in the evidence upon which" the complaint could succeed. Section 27(1)(c), in my view, encompasses the decision made in this case.

[34] Section 27(1)(c) has been addressed by this court on two occasions, first in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95. In addressing the standard of review applicable to a decision without a hearing under s. 27(1)(c) Mr. Justice Smith said:

> [22] However, the appellant's submission overlooks the differences in nature between decisions made with and those made without a hearing. The latter involve findings of fact on a balance of probabilities reached after a weighing of the evidence presented, while the former involve only a preliminary assessment of the evidence submitted in order to determine whether that evidence warrants going forward to the hearing stage. Thus, in dismissing the appellant's complaint without a hearing, the Tribunal member did not weigh the evidence and make findings of fact that would be subject to review pursuant to s. 59(2). Rather, she merely concluded that the evidence did not justify the time and expense of a full hearing because, in her judgment, there was no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence. Accordingly, s. 59(2) is not engaged and the exercise of this discretion falls to be reviewed according to the standard of patent unreasonableness pursuant to s. 59(3).

[35] *Berezoutskaia* was reviewed in *Gichuru v. British Columbia (Workers' Compensation Appeal Tribunal),* 2010 BCCA 191. Mr. Justice Chiasson referred to the passage just replicated, and said at para. 25:

> Two important points emerge: the standard of review and the nature of the inquiry. The Member does not weigh the evidence or make findings of fact on an application of s. 27(1)(c) of the *Code*.

[36] I recognize that the case before us is somewhat different from *Berezoutskaia* and *Gichuru*. However it seems to me the reasoning and understanding of the scheme engaged in those cases is apt to this appeal. While the Tribunal embarked on a hearing, it did not complete it, having formed a view and without weighing credibility, that the allegation the Union failed to respond appropriately to her complaint of harassment could not succeed. In a similar vein, it found her complaints as to administration of the collective agreement could not succeed against the Union, and referred to evidence adduced by J.J. that her first complaint on these matters to the Union was at a meeting in 2005 at which the Union President stated his understanding that casual workers did not accumulate seniority (a result which would nullify recall rights) and casual painters could not be in charge of jobs. The

Tribunal concluded that this evidence demonstrated a lack of nexus between the adverse effect of which J.J. complained, and her gender. The conclusions reached, on my understanding of the decision, thus did not engage a weighing of the evidence or assessment of credibility, but rather a more detached, inventory-style, review of the evidence adduced to determine whether there was any reasonable prospect of success. In this, the assessment of the complaint was much like the assessment done in *Berezoutskaia,* although performed from the larger platform of a partial hearing. This court's view of the appropriate standard of review in *Berezoutskaia* is, in my view, applicable here, and that standard of review is one of patently unreasonable.

[37] I conclude, therefore, that the judge was correct in his conclusion on the applicable standard of review, and I see no basis to interfere with his conclusion that J.J. had not established serious grounds for relief so as to justify an extension of time for filing her petition for judicial review.

[38] In reaching this conclusion I am not unmindful that J.J. says some of the Tribunal's findings of fact which underlie the finding of discrimination on the part of the School Board, demonstrate the viability of her complaint against the Union. On my reading of the decision, there is no finding of discrimination on the interpretation of the collective agreement, which is the foundational document for the rights she asserts to accumulate seniority and enjoy supervisory responsibility. At the most, the decision is critical of the shop steward, her supervisor, and co-workers, in their response to J.J. and the issues she raised. Those findings do not include, however, findings the shop steward discriminated against her *qua* shop steward. The shop

steward is an employee of the School Board and not of the Union. It would not be appropriate to find discrimination on the part of the Union arising from actions that were not taken by the shop steward in the course of his acting as a Union representative, particularly where the complainant elected to take her several concerns to the Union President but asked him not to embark on an investigation.

[39] For these reasons I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Mr. Justice Tysoe"