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CASE SUMMARY: PROCEDURAL FAIRNESS REQUIRES NOTICE OF POTENTIAL TIMELINESS ISSUES

The application for judicial review was granted on the basis that the applicant was denied procedural fairness. The court remitted the matter for reconsideration by another decision-maker.

Administrative law – Decisions reviewed – Attorney General – Judicial review – Procedural fairness – Standard of review – Procedural requirements and fairness – Barristers and solicitors – Self-representation – Defamation – Labour law – Collective agreements

Kohlenberg v. Canada (Attorney General), [2020] F.C.J. No. 1116, 2020 FC 1066, Federal Court, November 18, 2020, R. Mosley J.

The applicant was a lawyer employed by the Department of Justice. The applicant became aware through separate proceedings involving the respondent that the respondent had in its possession a memorandum prepared by Max Baier, senior labour relations advisor, which contained incorrect information about the applicant's performance and disciplinary history. Namely, the memorandum suggested that the applicant had not met performance expectations in 2013-2014, but the applicant had previously grieved that assessment and it had been replaced with a "fully meets" rating before the memorandum had been prepared. The memorandum also suggested that the applicant had been disciplined for "behaviours", which the applicant suggested could be construed as implying more than one event, though the discipline he received in 2013-2014 had been for one incident.

The applicant wrote to Mr. Baier on August 16, 2015, advising of his position that the statements in the memorandum were defamatory. He was advised by letter on September 15, 2015, and again on November 19, 2015, that the appropriate vehicle to pursue the claim was the grievance process rather than a civil suit, as relevant legislation barred such an action.

On December 31, 2015, the applicant filed his grievance for defamation, breach of privacy, breach of natural justice, and denial of a fair hearing largely relating to the memorandum.

The grievance was heard in January 2019. The timeliness of the grievance was not raised at any point during the proceedings, nor was it raised during the hearing. Nonetheless, the defamation grievance was denied on the basis that it was filed outside the collective agreement's 25-day period from the day on which he had knowledge of the alleged violation. In the alternative, the applicant's grievance on its merits were found to be unsubstantiated.

The court granted the application on the basis that the applicant was denied procedural fairness. Specifically, the court held that the applicant ought to have been made aware of the timeline issue, and he ought to have been provided with an opportunity to respond to the issue at the hearing.

Though this finding was in itself sufficient to dispose of the application, the court made further comments to provide some guidance to the decision-maker who would reconsider the grievance. The court clarified the test for defamation, which includes an objective consideration of whether the impugned words would tend to lower the plaintiff's reputation in the eyes of a reasonable person. The prior decision-maker had instead considered whether the words actually caused harm to the plaintiff's reputation with respect to his clients or colleagues, rendering her decision on this point unreasonable.

This case was digested by [JoAnne G. Barnum](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact JoAnne G. Barnum at jbarnum@harpergrey.com.