CITATION: S.G. v. Criminal Injuries Compensation Board, 2106 ONSC 7485
DIVISIONAL COURT FILE NO.: 97/16
DATE: 20161216

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, C. Horkins and Emery JJ.

BETWEEN:	
S.G. Appellant	*Kristen Allen*, for the Appellant
– and –	
CRIMINAL INJURIES COMPENSATION BOARD Respondent	*Brian Blumenthal*, for the Respondent
	HEARD at Toronto: November 29, 2016

Swinton J.:

Overview

[1] The appellant appeals from a decision of the Criminal Injuries Compensation Board ("the Board") dated January 28, 2016 that dismissed her application for compensation under the *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24 ("the Act"). She had made her application on the basis that she had been the victim of a sexual assault perpetrated by the building manager of her apartment building.

[2] An appeal lies to this Court only on a question of law (see s. 23 of the Act). The appellant argues that she was denied procedural fairness because the conduct of one member of the Board during the hearing gave rise to a reasonable apprehension of bias. For the reasons that follow, I allow the appeal and set aside the Board's decision.

The Standard of Review

[3] Both parties agree that there is no standard of review applicable to an allegation of procedural unfairness. Instead, the court determines whether the requisite level of procedural fairness has been accorded.

The Fresh Evidence

[4] The proceedings before the Board are not recorded. Accordingly, there is no transcript to review.

[5] Moreover, at the time the appellant filed her Notice of Appeal, Appeal Book and factum, there were no written reasons from the Board available for review. Apparently, the Board delivered oral reasons at the end of the hearing, but there appears to have been no transcription of them.

[6] To fill this gap, the appellant brought a motion seeking to file affidavits sworn by the articling student and the law clerk who represented her at the hearing. The affidavits attest to the impugned conduct during the hearing and the content of the oral reasons. Evidence such as this is admissible to disclose a breach of the rules of natural justice that cannot be assessed by a reference to the record (*142445 Ontario Ltd. (c.o.b. as Utilities Kingston) v. International Brotherhood of Electrical Workers, Local 636*, [2009] O.J. No. 2011 (Div. Ct.) at para. 18).

[7] The affiants made notes immediately after the hearing, which were attached as an exhibit to their affidavits. In the affidavits, they state that one member of the Board aggressively cross-examined the appellant throughout her evidence. The interventions reflect stereotypical and erroneous assumptions about how victims of sexual assault should respond, as she was asked why she did not scream, physically resist, or run away from the alleged perpetrator. The articling student objected but the line of questioning continued. The member also asked why the appellant delayed in reporting to the police, and why she continued to associate with the alleged perpetrator and care for his children following the assault.

[8] The affidavits characterize the panel member's tone as aggressive and also describe his physical conduct in reaction to the appellant's testimony, such as shaking his head and sighing several times during the appellant's evidence.

[9] In his notes, the articling student summarizes the brief oral reasons given at the end of the hearing to the effect that "the police didn't find any evidence, so neither can we." The law clerk states that in the oral reasons, the Board relied on the testimony of the police witness.

The Appeal

[10] The appellant launched this appeal in late February, 2016. Before doing so, she requested that the Board provide written reasons. She then perfected her appeal in April, filing her factum, Appeal Book and the motion for fresh evidence.

[11] On July 6, 2016, the Board issued 31 pages of reasons explaining why the appeal had been dismissed.

Analysis

[12] The only issue in this appeal is whether the appellant was denied procedural fairness because the conduct of the panel member described above gave rise to a reasonable apprehension of bias.

[13] The test for a reasonable apprehension of bias is well-established: would a reasonable, informed person, viewing the matter realistically and practically, conclude that the decision-maker would likely not decide the matter in an impartial manner (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21). As the Supreme Court of Canada stated in *Yukon*, "The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process" (at para. 22).

[14] There is a presumption of judicial impartiality, and the application of the test is contextual and fact-specific. The onus is on the appellant in a case such as this to show a "real likelihood or probability of bias" (*Yukon* at para. 25).

[15] Counsel for the Board submitted that the appellant had not met her onus for a number of reasons: the affidavits were insufficient, as they were lacking in specificity; even if the member's questions reflected rape myths, the appellant failed to show that the outcome was influenced by impermissible stereotypes; and the appellant must be taken to have waived any bias, because she did not present a motion for recusal to the Board at the time of the hearing.

The sufficiency of the affidavits

[16] The Board submits that the affidavits are deficient because they are not detailed, and they do not provide a full contextual summary of the proceedings before the Board.

[17] I disagree. There is no transcript of the proceedings before the Board, but that does not require the appellant to, in effect, create one for purposes of an appeal such as this. The affidavits filed on behalf of the appellant are sufficient to describe the conduct of the Board member that gave rise for concern. While the affidavits go further than this and include opinions of the affiants, that does not render them deficient. They are sufficiently detailed to set out the conduct of the member during a hearing which lasted only a few hours.

Did the member's conduct give rise to a reasonable apprehension of bias?

[18] It is the appellant's position that the panel member's overall conduct in the hearing gave rise to a reasonable apprehension of bias. In response, the Board submits that the conduct must

be looked at in context, and the reasons issued in July, 2016 disclose that the Board relied on the totality of the evidence in assessing the appellant's application.

[19] I agree with the appellant's submission that the reasons, issued months after the initial decision and after the appeal had been launched, are irrelevant to the determination whether the member's conduct *during* the hearing gave rise to a reasonable apprehension of bias. In my view, it did.

[20] In coming to that conclusion, I am aware that the Board is often required to play an inquisitorial role. Often the alleged perpetrator does not appear for the hearing. Many applicants are not represented by counsel. Accordingly, the Board must play an active role in questioning applicants and witnesses in order to determine the merits of applications.

[21] However, in the present case, the conduct of the Board member, looked at cumulatively, gave rise to a reasonable apprehension of bias. First, the member asked a number of questions that reflected rape myth stereotypes about the reactions of victims of sexual assault. For example, he repeatedly asked why the appellant had not screamed or run away, both questions that reflect rape myths that would be an improper line of cross-examination in a criminal trial (*R. v. Osolin*, [1993] 4 S.C.R. 595 at paras. 168-69). He continued to ask these questions even after objection by the appellant's representative. He also asked other questions reflecting rape myth stereotypes, such as why the victim did not complain immediately to police and why she continued to have contact with the alleged perpetrator.

[22] Second, the behaviour of the member during the hearing, coupled with the tone and line of questioning, gives rise to concerns about the fairness of the proceeding. He was aggressive in tone, and he demonstrated impatience, if not skepticism during the appellant's testimony. While the Board's process is often inquisitorial in nature, the Board should not take an adversarial position vis-à-vis an applicant.

[23] I am satisfied that when the member's conduct during the hearing is considered as a whole, a reasonable person, properly informed, would conclude that he was not likely to decide the case with an open mind. The reasons issued many months later do not cure the appearance of unfairness during the oral hearing.

Waiver

[24] The Board argues that even if there was an appearance of bias, the appellant must be taken to have waived it, because her representative did not ask the Board member to recuse himself because of a reasonable apprehension of bias.

[25] There is no merit to this argument. The appellant's representative objected to the line of questions that reflected rape myths and explained why. The member continued to ask this type of question despite the objection.

[26] Waiver requires that a litigant know of a potential issue of bias and take no steps to raise it until after he or she has been unsuccessful. That is not the present situation.

Conclusion

[27] The appeal is allowed. The decision of the Board is set aside, and the matter is remitted to a different panel of the Board for a new hearing.

[28] The appellant seeks costs. The Board submits that it should not be subject to costs, because it appeared to assist the court, given that no other party would be appearing.

[29] In my view, this is a case where costs are appropriately awarded against the Board, as in *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 7702 (Div. Ct.) at para. 5. The Board has appeared as a party in this appeal and has taken an adversarial position on the merits of the appeal. The appellant, as the successful party, has a reasonable expectation of costs in these circumstances.

[30] Accordingly, costs to the appellant are fixed on a partial indemnity basis at $6,000.00 all inclusive.

_____

Swinton J.

I agree

_____

C. Horkins J.

I agree

_____

Emery J.

Released: December 16, 2016

CITATION: S.G. v. Criminal Injuries Compensation Board, 2106 ONSC 7485
DIVISIONAL COURT FILE NO.: 97/16
DATE: 20161216

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, C. Horkins and Emery JJ.

BETWEEN:

S.G.

Appellant

– **and** –

CRIMINAL INJURIES COMPENSATION BOARD

Respondent

REASONS FOR JUDGMENT

Swinton J.

Released: December 16, 2016