Federal Court  Cour fédérale

Date: 20100319

Docket: T-72-10

Citation: 2010 FC 322

Toronto, Ontario, March 19, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

COUCHICHING FIRST NATION

Applicant

and

DANIEL J. BAUM and AIMEE ADAMS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Couchiching First Nation (the "Applicant") seeks an Order staying Dr. Daniel Baum (or the "adjudicator") from continuing with the hearing of the complaint filed by Ms. Aimee Adams (the "Respondent") under the provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "CLC").

[2] The Applicant is the former employer of the Respondent. The Respondent alleges that she was unjustly dismissed from her employment on March 6, 2007. The Respondent submitted her complaint pursuant to the CLC on May 11, 2007.

[3] The Applicant filed the underlying application for judicial review on January 15, 2010, seeking the following relief:

1. an Order setting aside the decisions of Respondent Baum and directing that the hearing of the Complaint take place, in its entirety, in or near Couchiching First Nation;
2. an Order removing Respondent Baum as adjudicator of the Complaint, and voiding all decisions made by Respondent Baum in relation to the Complaint proceedings;
3. its costs of this application; and
4. an Order granting such further and other relief as counsel may request and this Honourable Court may permit.

[4] The Notice of Motion seeking a stay of the hearing before Dr. Baum was filed on February 22, 2010. Paragraphs (a) and (b) of the Notice of Motion set out the grounds of the motion as follows:

i. The Applicant commenced the within Application on January 15th, 2010 to challenge a decision of Respondent and Adjudicator Daniel Baum to hold the CLC Complaint hearing in Thunder Bay ON for his sole convenience, as opposed to Fort Frances ON where the events occurred and the parties and witnesses reside, and to remove and or preclude Respondent Baum from acting as Adjudicator of the Complaint due to bias demonstrated in the lead up to and during the first day of the hearing of the Complaint.

ii. Respondent Baum declined the Applicant's request to change the location of the hearing, to recuse himself as Adjudicator of the Complaint and to delay the Complaint hearing until disposition of the within Application.

[5] The Applicant filed four affidavits in support of its motion as follows:

a. the Affidavit of Cynara Bruyere, executive assistant for the Couchiching First Nation Administrative Office and to Mr. Smokey Bruyere, sworn on February 10, 2010;

b. the Affidavit of Coral Chisel, legal assistant to Ms. Chantelle Bryson, sworn on February 11, 2010;

c. the affidavit of Smokey Bruyere, Band Manager for the Couchiching First Nation, sworn on February 11, 2010; and

d. the second affidavit of Coral Chisel sworn on February 19, 2010.

[6] The first affidavit of Coral Chisel refers to 44 exhibits, including correspondence between Counsel for the Applicant and Dr. Baum. The exhibits also include various rulings by the adjudicator upon a number of objections raised by Counsel for the Applicant concerning the conduct of the hearing into the Respondent's complaint. The tone of the correspondence from Counsel for the Applicant is aggressive and antagonistic, verging at times on intimidation.

[7] The test for a stay is tripartite and conjunctive, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, that is a serious issue for trial arising from the underlying

originating document, in this case an application for judicial review, the denial of the relief sought will cause irreparable harm and that the balance of convenience favours the party seeking the stay.

[8] The Applicant submits that it has met the three requirements for a stay as discussed in *RJR-MacDonald*.

[9] The Applicant claims that Dr. Baum has shown bias and points to his decision to schedule the hearing of the complaint in Thunder Bay rather than in Fort Frances. The Applicant also points to the decision of Dr. Baum refusing to recuse himself, a decision set out in a letter dated December 21, 2009 in response to a request presented by Counsel for the Applicant in her letter of December 16, 2009.

[10] Relying on the decisions in *Royal Canadian Mounted Police v. Malmo-Levine* (1998), 161 F.T.R. 25 (T.D.), *Woloshyn v. Yukon Teachers Association* [1999] Y.J. No. 69 (Y.T.S.C.)(Q.L.), *Zündel v. Canada (Canadian Human Rights Commission)*, [1999] F.C.J. No. 107 (T.D.)(Q.L.), the Applicant argues that serious allegations of bias meet the requirements of a serious issue for the purpose of a stay and further that a challenge based on allegations of bias is a challenge to the jurisdiction of the tribunal in issue.

[11] The Applicant relies on the decisions in *Guttierez v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. 608 (T.D.)(Q.L.) and *Great Atlantic and Pacific Co. of Canada Ltd. v. Ontario (Minister of Citizenship)* (1993), 62 O.A.C. 1 (Div. Crt.) to argue that the interests of justice

are best served, in the face of serious bias allegations, by halting a hearing at an early stage rather than proceeding to a decision that may be flawed, notwithstanding the availability of judicial review.

[12] The test for bias is set out in the decision of the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394 as follows:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - - and having thought the matter through - - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[13] This test is not easily met.

[14] The affidavit material, including the exhibits, shows that Dr. Baum has made certain rulings against certain requests made by the Applicant, including a refusal to adjourn in October 2009 and a refusal to recuse himself. Insofar as the affidavit of Mr. Smokey Bruyere and the second affidavit of Ms. Chisel purport to offer a view of the conduct of the adjudicator at the hearing held on December 1, 2009, I assign those affidavits little weight. Mr. Bruyere is not a disinterested party and Ms. Chisel is relating hearsay evidence.

[15] The adjudicator, acting under the provisions of the CLC, is authorized to control the processes of the hearing, subject to the requirements of natural justice and procedural fairness. A well-founded allegation of bias militates against respect for procedural fairness and natural justice.

[16] Not every negative decision by an adjudicator can, or will be, the basis of an allegation of bias. In this regard, I refer to the decision in *Boparai v. Canada* (2008), 79 Admin. L.R. (4th) 240 where counsel for the applicant raised a motion for recusal against the presiding judge on the grounds that the fact that he had previously filed a complaint against the judge gave rise to a reasonable apprehension that she could be biased against him. The presiding judge resolutely rejected the motion.

[17] I repeat that not every allegation of bias, which is said to be the basis of the underlying application for judicial review, gives rise to a serious issue either for a hearing on the merits or for the purposes of a stay motion. In the circumstances of this case, I need not decide whether the Applicant has shown that a serious issue for trial exists because I am not satisfied in any event, that the Applicant has met its burden to show that it will suffer irreparable harm if the stay is refused.

[18] The Applicant claims that it will be exposed to significant costs in attending hearings in Thunder Bay when most, if not all, the witnesses for the Applicant live in Fort Frances. The Applicant says that it will be unable to recover those costs if it successfully defends the Respondent’s claim of unjust dismissal.

[19] According to the jurisprudence, a party seeking a stay must adduce non-speculative evidence in support of the issue of irreparable harm. I refer to the decisions in *Nature Co. v. Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 and *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34.

[20] The affidavits filed on behalf of the Applicant do not provide adequate evidence of irreparable harm. Indeed, these affidavits fail to address that issue but focus on the history of the events leading up to the first day of the hearing of the Respondent's complaint. In the absence of sufficient probative evidence of irreparable harm, the Applicant's motion for a stay must fail.

[21] I note that the Applicant relied on the same arguments in respect of the issue of balance of convenience as it had advanced in respect of the issue of irreparable harm. However, as noted above, the Applicant did not present sufficient probative evidence to support its claim that it would suffer irreparable harm. It follows then, that the Applicant cannot show that the balance of convenience lies in its favour.

[22] The record filed in this motion raises some worrisome concerns. In my opinion, the Applicant or its Counsel, or both, are attempting to impede and delay the hearing of the Respondent's complaint. This is an attempt to manipulate the summary hearing procedure granted under the CLC and an attempt to manipulate the legitimate role of the adjudicator in establishing the parameters and processes of the hearing. This course of conduct is improper.

[23] The Applicant sought costs, payable forthwith, if successful on this motion. Since it has not succeeded, it is not entitled to costs and there will be no order as to costs relative to this motion.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the motion is dismissed, no order as to costs relative to this motion.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-72-10
STYLE OF CAUSE:	COUCHICHING FIRST NATION v. DANIEL J. BAUM and AIMEE ADAMS
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	March 15, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	March 19, 2010

APPEARANCES:

Chantelle J. Bryson	FOR THE APPLICANT
No Appearance	FOR THE RESPONDENT (Self-Represented)

SOLICITORS OF RECORD:

Buset & Partners LLP Barristers and Solicitors Thunder Bay, ON	FOR THE APPLICANT
N/A	FOR THE RESPONDENT (Self-Represented)