Federal Court  Cour fédérale

Date: 20121128

Docket: T-1740-11

Citation: 2012 FC 1392

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
BETWEEN:

CONSEIL DES MONTAGNAIS DE NATASHQUAN

Applicant

and

EVELYNE MALEC, SYLVIE MALEC, MARCELLINE KALTUSH, MONIQUE ISHPATAO, ANNE B. TETTAUT, ANNA MALEC, ESTELLE KALTUSH AND THE CANADIAN HUMAN RIGHTS COMMISSION, THE CANADIAN HUMAN RIGHTS TRIBUNAL AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER

SIMON NOËL J.

[1] These reasons follow the order issued by this Court on November 9, 2012.

[2] This is an application for judicial review of a decision dated September 29, 2011, and delivered by the Chairperson of the Canadian Human Rights Tribunal [the Tribunal]. In that decision, the Chairperson held that Member Doucet would sit in review of the decision he

himself had rendered, which was the subject of a judicial review allowed by this Court. The applicant and the Canadian Human Rights Commission [the CHRC] filed written submissions in support of their respective positions and presented oral arguments at the hearing.

I. The facts

[3] The respondents filed a complaint with the Canadian Human Rights Commission [the Commission] against the applicant on April 21, 2007. They argued that it was discriminating against them because of their race or national or ethnic origin, contrary to section 7 of the *Canadian Human Rights Act*, RSC (1985), c H-6.

[4] The complaint was referred to the Tribunal. It was allowed in part by the Tribunal in a decision rendered on January 27, 2010. Member Doucet found that the system of isolated post allowances established by the applicant for employees not residing in the community was discriminatory, as the allowances are generally granted to non-Aboriginals. He also found that the applicant had not provided a bona fide justification to rebut the *prima facie* presumption of discrimination.

[5] The applicant filed an application for judicial review of the Tribunal's decision. It was allowed in a decision rendered on December 23, 2010 (*Conseil des Montagnais de Natashquan v Malec*, 2010 FC 1325, 2010 CarswellNat 5666). The Court held that Member Doucet's decision did not fall within the range of reasonable outcomes defensible in respect of the facts and law, given that he had not considered all of the evidence presented by the applicant to explain why the *prima facie* evidence of discrimination was rebuttable.

[6] The Court found that the evidence of a justification had been erroneously rejected outright by the decision maker, who had an obligation to consider it, analyze it and address it in his decision. The decision maker failed to consider the testimony of three people who had provided a justification for the system of isolated post allowances, which the decision maker had declared to be *prima facie* discriminatory.

[7] Justice Tremblay-Lamer's order reads as follow:

> THE COURT ORDERS that the application for judicial review be allowed, that the decision be set aside and the matter be referred back to a member or panel of the Canadian Human Rights Tribunal for redetermination in accordance with these reasons. With costs.

[8] The respondents wanted to appeal the decision, but the time limit expired, and their application for an extension was refused.

[9] On March 7, 2011, the Tribunal's Director of Registry Operations issued instructions to the parties' counsel, asking them to file written submissions on how the case should proceed. All of the parties filed written submissions. Counsel for the applicant asked for a different member to be assigned to the file and for a *de novo* hearing.

[10] The Chairperson of the Tribunal decided to reassign the file to Member Doucet. In her decision, she gave him the discretion to determine his own procedure. That decision is the subject of this application for review.

II. The decision under review

[11] The Chairperson noted that Justice Tremblay-Lamer had not specified whether the case should be reassigned to Member Doucet or assigned to a different member.

[12] The Chairperson of the Tribunal considered the principles developed in the case law regarding the possibility for a decision maker to review a decision that he or she has rendered, in cases where such a situation does not lead to a reasonable apprehension of bias. She applied to the facts the test developed in the case law of whether an informed person, viewing the matter realistically and practically—and having thought the matter through—would more likely than not believe that Member Doucet, whether consciously or unconsciously, would not decide fairly if he had to examine the file again.

[13] According to the Chairperson, Member Doucet has a duty to act fairly and impartially. There is therefore a presumption that he will do so. The Chairperson of the Tribunal noted that the applicant has the burden of establishing a reasonable apprehension of bias.

[14] The Chairperson of the Tribunal found that the facts of this case were similar to those in *Gale v Canada (Treasury Board)*, 2004 FCA 13, 316 NR 395 [*Gale*], in which an Adjudicator had reviewed a decision that he had previously rendered because he had failed to consider one item of evidence. Moreover, she added that Member Doucet had never made any statements that would give rise to a reasonable apprehension of bias. The Chairperson of the Tribunal therefore found that the file could be reassigned to him, given that the applicant had not met its burden of establishing a reasonable apprehension of bias.

III. The submissions of the applicant and the Commission

A. *Did the Chairperson of the Tribunal err in assigning to Member Doucet the review of his own decision?*

[15] The applicant raises several arguments against the decision. The applicant submits that Member Doucet will not act impartially and that his reassignment to the file would be a violation of the right to a fair and impartial hearing. The applicant submits that administrative tribunals must meet the requirement of impartiality and that they must therefore avoid having a decision maker review his own decision, except where it is explicitly or implicitly permitted by law, which is not the case here. Therefore, another decision maker must be assigned to the file so that the principles of procedural fairness and natural justice are respected.

[16] According to the applicant, the member has certainly formed an opinion about the evidence he has heard. Moreover, he is being asked to make determinations about evidence that is not new. The evidence in question was submitted to him at the hearing, and he concluded that there was a lack of evidence. Member Doucet cannot reassess evidence that he had initially ignored. He has already made a negative assessment of the witnesses' credibility and therefore cannot assess it again.

[17] It adds that if the Federal Court had wanted the same decision maker to hear the case, this would have been clearly indicated in its decision.

[18] Finally, the applicant proposes *de novo* proceedings so that it can exercise its right to make full answer and defence. However, during the submissions, counsel for the applicant

mentioned that it was possible to shorten the evidentiary process by not rehearing some of the testimony already heard, but rather relying on the archives of the proceedings that have already taken place before the Tribunal.

[19] The Commission, on the other hand, argues that no reasonable apprehension of bias arises from Member Doucet's reassignment to the file. A decision that has been the subject of a judicial review that is remitted for rehearing does not in itself create a problem of bias. According to the Commission, specific, concrete evidence is required to rebut the presumption of impartiality of a decision maker. The fact that he must review a decision that he has rendered, following instructions from the Federal Court to consider all of the evidence, does not raise an apprehension of bias.

[20] The Commission cites *Vilven v Air Canada*, 2009 FC 367, [2010] 2 FCR 189 [*Vilven*], in support of its arguments. In that case, this Court allowed the application for judicial review of a decision of the Tribunal. The case was remitted to the decision maker who had rendered the impugned decision and ultimately reached a different conclusion.

[21] It has been suggested that the decision maker in this case must correct an error of law that he committed when he heard the case the first time. According to the Commission, all he needs to do is take into account the evidence that he had not considered. The failure to consider certain items of evidence does not mean that the decision maker has decided the issue in advance.

[22] According to the Commission, it is in the public interest that the member who first heard the matter sit in review, given his in-depth knowledge of the file.

[23] It also submits that in its decision of December 23, 2010, the Federal Court did not order that the matter be remitted to a different member or that a *de novo* hearing be held. If Justice Tremblay-Lamer had wanted it otherwise, she would have indicated this clearly in her conclusions.

[24] According to the Commission, this application for judicial review is a disguised appeal of the decision of December 23, 2010. The applicant should have appealed the decision, or at least requested a clarification. Therefore, the Commission submits that the applicant has waived the possibility of raising the issue of bias and that this application constitutes an abuse of process.

B. *Did the Chairperson of the Tribunal err in rendering her decision without allowing the parties to make oral submissions and in allowing the CHRC to intervene?*

[25] The applicant submits that the Chairperson of the Tribunal did not respect the principles of natural justice and erred in not allowing the parties to make oral submissions before she rendered her decision. According to the Commission, there is no obligation to allow the parties to make oral submissions. Proceedings are to be conducted informally, according to section 48.9 of the *Canadian Human Rights Act*, RSC (1985), c H-6. In this case, written submissions sufficed.

[26] The applicant also raises procedural arguments:

- the participation of the Canadian Human Rights Commission in Tribunal proceedings; and

- the use of the word “requête” [motion] in the heading of the decision of the Chairperson of the Tribunal.

According to the Commission, these arguments are not determinative of this application for judicial review.

[27] Having reviewed the various arguments, the Court finds that the argument relating to the importance of respect for the principle of impartiality of the member and the assignment of the file to the person who had originally decided the matter raises an important issue that will be determinative of this case. As explained during the hearing, the Court will make the necessary determinations on this issue, which will also determine the final outcome of the dispute on which this application for judicial review is based. Therefore, it will not be necessary to address the procedural arguments.

IV. The issue

[28] The following issue is at the heart of this dispute:

- Did the Chairperson of the Tribunal err in assigning the file to Member Doucet?

[29] Given that this is a question of procedural fairness relating to one of the fundamental elements of our judicial and quasi-judicial systems, namely, the impartiality of the decision maker, the issue will be reviewed on a standard of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 44, [2009] 1 SCR 339).

V. The analysis

[30] The test of reasonable apprehension of bias was established in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, 9 NR 115 at paragraph 40:

> [T]he 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. . . . [T]hat 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."

This case establishes the approach that must be followed, but particular attention will be paid to *Gale*, above, given that that this was the case on which the Chairperson primarily relied in deciding to reassign the case to Member Doucet. She found that the facts in that case resembled the facts in this case. Therefore, to analyse this case properly, one must ask whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that Member Doucet, whether consciously or unconsciously, would not decide fairly.

[31] Member Doucet's decision is a final one, in which, after reviewing the evidence, he decided how much weight to give the testimony and to what extent it was credible and made any

determinations he considered appropriate. The member in fact rejected some testimony and preferred other testimony.

[32] Justice Tremblay-Lamer found that Member Doucet's decision was unreasonable. Her criticisms were serious. She described as "not true" the statement that the employer had failed to submit any evidence to justify the isolated post allowance policy. The judge held that the member had failed, "without a valid reason", to assign any probative value to the admission of a witness during cross-examination. She also criticized the decision maker for failing to examine the testimony of another witness regarding the isolated post allowance. Finally, the judge criticized the member for failing to consider "all of the testimony".

[33] These are major, serious reproaches, which should be considered in the context of assigning the file to a member, since this decision must be fair and equitable.

[34] The Chairperson of the Tribunal did not indicate in her decision whether she had taken into account the criticisms directed against the member's work. This strikes the Court as a major omission in the context of her evaluation of which decision maker should be assigned to the file.

[35] Such criticisms rendering the member's decision unreasonable must necessarily have a significant impact on the person against whom they are directed and influence his frame of mind, whether consciously or unconsciously. It is also important to consider the impression made by these criticisms in the eyes of an informed person who must consider whether a given member is the appropriate person to reassess the evidence and make new determinations fairly.

[36] Naturally, there is a presumption of judicial impartiality and mere doubts do not suffice to call this into question. However, in this case, knowing that the decision was declared "unreasonable" on the basis of strong and serious criticisms, going to the very heart of the decision and the work normally required of a member in a similar situation, will necessarily influence the assessment of an informed person looking at such a situation objectively. It should be recalled that the member signed a final decision in which he decided the questions of fact and law that were before him.

[37] But there is more to it than that. In the first paragraph of her decision, the Chairperson limits her understanding of the file and the case to the fact that the decision maker erred in determining that there was no evidence in the file justifying the applicant's *prima facie* discriminatory policy. Such a general understanding does not do justice to Justice Tremblay-Lamer's reasons and judgment.

[38] I can only reiterate the judge's important comments from paragraph 36 of her decision (see *Conseil des Montagnais de Natashquan v Malec*, 2010 FC 1325):

> It is one thing to say that a piece of evidence is insufficient to overturn a *prima facie* case of discrimination, but it is quite another to completely ignore, as is the case here, the evidence of bona fide justification that had been submitted.

The Court then adds:

> The Tribunal should have taken the applicant's explanations into account and then decided whether, under the applicable case law and having considered the totality of the evidence, these explanations were sufficient to overturn the *prima facie* case of discrimination.
>
> [Emphasis added]

[39] The task of the member assigned to the file will not be limited to considering the evidence establishing the *prima facie* presumption of discrimination. He may also be called upon to assess the reasonableness of the compensation awarded by the Tribunal to the respondents (see paragraphs 37, 12, 13 and 14 of Justice Tremblay-Lamer's decision). In her decision, the Chairperson of the Tribunal did not take into consideration all of the work required by the decision maker and the impact on a member who has already made up his mind by making specific determinations with respect to all of these factors. In such circumstances, it is an error to call upon a member to sit on appeal from his own decision and to ask him to look at certain testimony (that he did not consider overtly) more attentively or to ask him to reconsider his findings regarding the isolated post allowances, should this be necessary. An informed person would have much cause for concern with respect to the objectivity and impartiality required of a member.

[40] The Chairperson of the Tribunal relied on *Gale*, above, to justify her decision to reassign the file to Member Doucet. In that decision, the Federal Court of Appeal remitted the matter to the same Adjudicator who had rendered the initial decision. In that case, an issue of procedural fairness was raised, as a decision maker rendered a decision without waiting for the results of a further inquiry that he himself had requested. The Federal Court of Appeal concluded that this

had deprived the appellant of the procedural fairness to which he was entitled and remitted the matter to the same Adjudicator for redetermination. Such a situation was not found to raise an issue of bias or a reasonable apprehension of bias.

[41] That is very different from the case before us. As mentioned above, the criticisms directed against the member are serious and significant, and a completely new assessment of the testimony is required, taking into account the law applicable to such circumstances. In *Gale*, above, the failure to wait for the results of a further inquiry was noted and the file was remitted to the Adjudicator for redetermination, taking into account the new information. By comparing *Gale*, above, with this case, the Chairperson of the Tribunal again demonstrated her limited understanding of Justice Tremblay-Lamer's reasons and judgment and their consequences.

[42] An informed person, aware of the issues, who has taken into consideration the member's decision; Justice Tremblay-Lamer's reasons and judgment, including her criticisms and the work to be done; and the decision of the Chairperson of the Tribunal reassigning the file to the same member could only conclude that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide fairly.

[43] Counsel for the Commission argued that judicial economy favours reassignment to the same member. This would save time for the parties and the decision would save judicial resources. When the interests of justice are at stake and the impartiality of a decision maker is called into question, time and financial considerations must give way to the most fundamental

aspect of our judicial system, the right to see one's case decided by an impartial and neutral decision maker free of any ties that could influence him or her unduly.

[44] I would add, taking into account the opening remarks of counsel for the applicant during the hearing, that a new member would have the opportunity to speak with the parties and their counsel to find appropriate ways to make efficient use of the work already done, with a view to saving time and money. This will better serve the interests of justice and the parties.

[45] Recently, in the course of a motion for adjournment pending a decision of the Federal Court on this application for judicial review, Member Doucet, despite having no motion for recusal before him, responded in a decision rendered on April 11, 2012, to the argument raised that the applicant's request for an adjournment was justified by a reasonable apprehension. He concluded that the situation arising from Justice Tremblay-Lamer's judgment is not a sufficient [TRANSLATION] "basis for a reasonable apprehension of bias". He did so in the same manner as the Chairperson of the Tribunal, without regard for the work required, what it implies and the criticisms directed against him. He found that the circumstances did not create a reasonable apprehension of bias. According to him, an informed person would find that he had merely committed an error of law in his evaluation of the law and the facts. It was partly on this basis that he dismissed the motion for an adjournment of the hearing.

[46] This Court is of the view that it was not appropriate to make such a finding at that stage. He was not considering a motion for recusal and the parties had not made submissions on such a motion. Furthermore, he does not seem to attribute any importance to the judgment rendered

regarding his decision and does not seem to be cognizant of the task to be done and the criticisms directed against him. Proceeding in this manner seems to indicate a desire to hear the file before the Federal Court has rendered its decision on the application for judicial review of the decision by the Chairperson of the Tribunal. This suggests that the member is not acting objectively.

[47] I note that the respondents, Évelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec and Estelle Kaltush, did not file a memorandum with respect to costs. The Commission has intervened in the file. Its participation has been useful for the determinations made in the file. Accordingly, no costs will be awarded.

[48] In conclusion, the Court finds that in the circumstances, the Chairperson's decision did not take into account all of the work that must be redone or the criticisms directed against the member. Because she failed to take these important elements into account, her analysis of the member's impartiality in such circumstances is erroneous. Thus, an informed person familiar with the file would conclude that it is more likely than not that the member, whether consciously or unconsciously, would not decide fairly. The matter is therefore remitted to the Chairperson for reassignment to a different member.

[49] I also have before me a motion for a stay of the hearing scheduled for November 21, 22 and 23, 2012. It goes without saying that since the application for judicial review is allowed, the hearing scheduled for late November will not take place.

[50] Because these reasons could not be ready before the hearings scheduled for late November 2012, the Court signed an order on November 9, 2012, allowing the application for judicial review, and remitted the file to the Chairperson for reassignment to another member.

"Simon Noël"

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Judge

Ottawa, Ontario
November 28, 2012

Certified true translation
Francie Gow, BCL, LLB

SOLICITORS OF RECORD

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APPEARANCES:

John White	FOR THE APPLICANT
Giacomo Vigna	FOR THE RESPONDENT THE CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

Dussault, Larochelle, Gervais, Thivierge Québec, Quebec	FOR THE APPLICANT
Giacomo Vigna Counsel Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENT THE CANADIAN HUMAN RIGHTS COMMISSION