

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150423**

**Docket: A-363-14**

**Citation: 2015 FCA 105**

**CORAM: NADON J.A.  
DAWSON J.A.  
BOIVIN J.A.**

**BETWEEN:**

**NAVIN JOSHI**

**Appellant**

**and**

**CANADIAN IMPERIAL BANK OF  
COMMERCE**

**Respondent**

Heard at Toronto, Ontario, on April 21, 2015.

Judgment delivered at Toronto, Ontario, on April 23, 2015.

**REASONS FOR JUDGMENT BY:**

**BOIVIN J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
DAWSON J.A.**

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**REASONS FOR JUDGMENT**

**BOIVIN J.A.**

[1] This is an appeal from a decision of Mr. Justice Russell of the Federal Court (the judge) dated July 21, 2014 (2014 FC 722). The judge dismissed Mr. Navin Joshi's (the appellant) application for judicial review of a decision of an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) dismissing the appellant's complaint of unjust dismissal on the basis that the adjudicator had no jurisdiction to consider the complaint.

[2] More specifically, the adjudicator considered that paragraph 242(3.1)(b) of the Code barred him from hearing the complaint because the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) provided another statutory procedure for redress. The adjudicator also found that the stay of the appellant's unjust dismissal complaint, to which the appellant had agreed, remained in effect.

[3] On May 31, 2006, the respondent hired the appellant under a program for persons with disabilities. The appellant's employment was terminated on April 8, 2010. He filed the unjust dismissal complaint at issue under the Code on May 14, 2010 as well as a complaint alleging discrimination on the basis of disability under the Act on June 24, 2010.

[4] An adjudicator was appointed under the Code to hear the unjust dismissal complaint. The respondent took the position that paragraph 242(3.1)(b) ousted the adjudicator's jurisdiction.

That paragraph states the following:

242. (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

...

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

242. (3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :

[...]

b) la présente loi ou une autre loi fédérale prévoit un autre recours.

[5] A hearing on that preliminary issue was scheduled for June 10, 2011. However, on the eve of the hearing, in emails between the appellant and respondent on June 8 and 9, 2011, the parties reached an agreement that stayed the unjust dismissal complaint. The appellant agreed that the adjudicator did not have jurisdiction to hear the complaint unless the Canadian Human

Rights Commission (the Commission) referred it back to the adjudicator pursuant to paragraph 41(1)(b) or 44(2)(b) of the Act (Email correspondence, appeal book, tab 5 at pages 122, 125-127 and 128).

[6] The hearing with respect to the unjust dismissal complaint was accordingly stayed, and the discrimination complaint under the Act proceeded before the Commission.

[7] The Commission's investigator recommended in the Section 40/41 Report that the Commission apply paragraph 41(1)(b) of the Act and decline to hear the complaint, as it was best dealt with under the Code. However, the appellant disagreed, and both parties made submissions asking the Commission to proceed with the complaint. The Commission acceded to these requests and conducted an investigation. An investigator recommended to the Commission in a report that the evidence did not support the appellant's allegations that he was discriminated against in the termination of his employment (Investigation Report, Commission, appeal book, tab 5 at pages 189-203). The Commission accepted the recommendation and therefore dismissed the discrimination complaint on October 31, 2011 (Decision of the Commission, appeal book, Tab 5 at pages 230-231).

[8] Unsatisfied with the Commission's decision, the appellant sought to re-activate his unjust dismissal complaint under the Code. The former adjudicator having resigned his appointment, another adjudicator was appointed. The respondent objected to the re-activation of the unjust dismissal complaint on the grounds that the adjudicator had no jurisdiction to hear this complaint as the stay between the parties remained in effect because the Commission had not referred the

matter back to adjudication under paragraph 41(1)(b) or 44(2)(b) of the Act. In addition, and in any event, the respondent maintained its original position that paragraph 242(3.1)(b) of the Code barred the adjudicator from hearing the complaint.

[9] On August 1, 2013, the adjudicator held that he indeed did not have jurisdiction to consider the unjust dismissal complaint, under both lines of argument advanced by the respondent (adjudicator's reasons, appeal book, Tab 5, p. 271 at para. 50). He found (i) that there was a stay agreement between the parties and (ii) that paragraph 242(3.1)(b) of the Code ousted his jurisdiction. This legal holding was based on his factual conclusion that the complaint before the Commission was substantially similar to that before him, as per *MacFarlane v. Day & Ross Inc.*, 2010 FC 556, [2011] 4 F.C.R. 117 [*MacFarlane*] (adjudicator's reasons at paras. 44-48).

[10] The judge upheld the adjudicator's conclusions regarding his lack of jurisdiction.

[11] In this appeal, the appellant raises a number of questions. In my opinion, they can be distilled into two issues:

- 1) In light of paragraph 242(3.1)(b) of the Code and the circumstances, did the adjudicator have jurisdiction to consider the appellant's unjust dismissal complaint?
- 2) Does the record disclose any breach of procedural fairness?

[12] On appeal from an application for judicial review, our Court must determine whether the judge appropriately identified and properly applied the standard of review to each of the issues before him (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47).

[13] I am of the view that the judge identified the proper standard for each issue.

[14] The judge determined that correctness was the standard to be applied to the adjudicator's jurisdictional determinations under paragraph 242(3.1)(b) of the Code, as a matter of true jurisdiction, following the decision of the Federal Court in *MacFarlane* (judge's reasons at para. 27). He noted that correctness equally applies to any questions arising as to procedural fairness, as per *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, [2014] S.C.J. No. 24 at para. 79 (judge's reasons at para. 31). The judge also followed *MacFarlane* to find that an adjudicator's determination of the substantially similar nature of complaints is essentially factual, and hence should be reviewed upon a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[15] Before our Court, the appellant contends that the adjudicator and the judge committed a number of factual and legal errors. In particular, the appellant argues that the adjudicator could not consider the agreement as it defeats the purpose of the Code and that a question of jurisdiction could not prevent the adjudicator from hearing the case. With respect, I do not agree.

[16] In the circumstance of this case, the adjudicator did not err in applying the agreement to decline jurisdiction. The terms of the agreement are clear and moreover tailored to the legal framework established in *MacFarlane*. The appellant agreed that he did not wish to proceed with his claim for unjust dismissal unless the Commission, after its investigation, referred the matter to the adjudicator. By agreeing that there should be no duplicity in seeking redress, the

appellant acknowledged that his complaint under the Code and to the Commission were substantially similar (Email correspondence, appeal book, Tab 5 at pages 131-133). I therefore reject the appellant's argument that he was "contracted out of the Code".

[17] The adjudicator was also correct to find that a question of jurisdiction under paragraph 242(3.1)(b) of the Code prevented him from hearing the case and determining the procedure to be followed pursuant to paragraph 242(2)(b). In the case at bar, and contrary to the facts in *MacFarlane*, the Commission dealt with the merits of the complaint and exercised its jurisdiction. Hence, the Commission's decision to dismiss the discrimination complaint can in no way be considered a referral under sections 41(1)(b) or 41(2)(b) of the Act. In light of the law as established in *MacFarlane* – by which the adjudicator was bound – he had no legal option but to decline jurisdiction.

[18] I am of the view that the judge rendered a thorough and well-reasoned decision. He did not err in finding that the adjudicator correctly applied *MacFarlane* nor in concluding that the adjudicator reasonably found that the discrimination complaint before the Commission and the unjust dismissal complaint before him were substantially similar (judge's reasons at paras. 57-58).

[19] I also agree with the judge that the record before him did not disclose any breaches of natural justice or procedural fairness. Similarly, these repeated allegations from the appellant before this Court are unsubstantiated, as are the appellant's bald assertions of bias. It is recalled

that claims of bias are extremely serious and should not be made in the absence of evidence. The appellant's arguments in that regard are without merit.

[20] In conclusion, the judge did not err in his application of the standards of review and I see no basis that would have justified setting aside the adjudicator's decision.

[21] For the above reasons, the appeal should be dismissed with costs.

“Richard Boivin”

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J.A.

“I agree  
M. Nadon J.A.”

“I agree  
Eleanor R. Dawson J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-363-14

**STYLE OF CAUSE:** NAVIN JOSHI v. CANADIAN  
IMPERIAL BANK OF  
COMMERCE

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**DATE OF HEARING:** APRIL 21, 2015

**REASONS FOR JUDGMENT BY:** BOIVIN J.A.

**CONCURRED IN BY:** NADON J.A.  
DAWSON J.A.

**DATED:** APRIL 23, 2015

**APPEARANCES:**

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