Federal Court of Appeal  Cour d'appel fédérale

**Date: 20130924**

**Docket: A-91-12**

**Citation: 2013 FCA 223**

**CORAM:** **NOËL J.A.**
**TRUDEL J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**GANDHI JEAN PIERRE**

**Applicant**

**and**

**PUBLIC SERVICE ALLIANCE OF CANADA**

**Respondent**

Heard at Montréal, Quebec, on September 10, 2013.

Judgment delivered at Ottawa, Ontario, on September 24, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
MAINVILLE J.A.

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## REASONS FOR JUDGMENT

**TRUDEL J.A.**

[1] This is an application for judicial review filed by the applicant, Gandhi Jean Pierre, in respect of a decision of the Public Service Labour Relations Board (the Board) made by Member Stephan J. Bertrand (*Jean-Pierre v. Arcand*, 2012 PSLRB 23).

[2] The Board dismissed the applicant's complaint under section 190 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act). It thereby declined to find that Pierre Arcand

(the respondent before the Board) had acted "in a manner that is arbitrary or discriminatory or that is in bad faith in the representation" of the applicant, specifically, in refusing to represent him in a grievance he had filed after the employer refused to consider his application regarding a notice of interest for an acting assignment (see section 187 of the Act).

[3] The dispute between the applicant and the Public Service Alliance of Canada arose from a very simple sequence of events. I describe these events here, if only to demonstrate how far a case can escalate when an applicant is convinced that his point of view represents the only possible outcome to the dispute and that the failure to recognize this view leads to the inevitable conclusion that the justice system is corrupt and its decision-makers are biased and acting in bad faith.

**The relevant facts**

[4] The applicant is an immigration officer at the Montréal office of Citizenship and Immigration Canada. While the applicant was on an acting assignment at the Embassy of Canada in Mexico, the Director of Operations at the Montréal office posted a notice of interest seeking potential applicants to temporarily staff some acting supervisor positions in Quebec. Interested applicants had to submit the required documentation before November 18, 2009.

[5] The applicant learned of this notice through unofficial channels, specifically, a co-worker, and indicated his interest before the deadline, although he needed an extension to send in the required documentation. The applicant finally submitted his duly completed application seven

(7) days after the deadline. This delay was fatal to the application, as the employer refused to consider it.

[6] This led the applicant to contact his union representative. At the outset, a union representative at the national level determined that, in his opinion, a grievance regarding the employer's refusal to consider the applicant's application had no chance of succeeding because the notice of interest concerned an acting appointment of less than four (4) months, for which there is no remedy (see the *Public Service Employment Regulations*, SOR/2005-334, at sections 12 to 14).

[7] However, in the hope of obtaining a settlement offer from the employer, a grievance simply seeking to have the employer consider the application was nevertheless filed at the first level of the employer's grievance process. The grievance did not contain any allegations of contempt or discrimination towards the applicant. This grievance was dismissed and then, at the applicant's request, taken by the union to the second level of the grievance process. However, Pierre Arcand advised the applicant that although the union would not be withdrawing the grievance, it would no longer be representing him. This led the applicant to file a complaint against Pierre Arcand for refusing to represent him in a grievance that he has since put on hold.

## **The Board's decision**

[8] After noting that the applicant's burden of proof required that he establish that the respondent, Pierre Arcand, had broken his duty of fair representation, the Board reviewed a few legal principles underlying its ultimate decision, which was a dismissal of the complaint.

[9] Among other things, the Board noted that although an employee is entitled to an appropriate analysis of his or her case, he or she is not entitled to the most thorough investigation possible (Reasons of the Board at paragraph 43). Similarly, the Board's role is to rule on the bargaining agent's decision-making process and not on the merits of its decision (*ibid*. at paragraph 44, citing *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28). Finally, the Board, citing *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, and *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, stated that the threshold for establishing arbitrary conduct—or discriminatory or bad faith conduct—is purposely set quite high so that bargaining agents are afforded substantial latitude in representational decisions (*ibid*. at paragraph 48).

[10] Having considered the facts and the evidence adduced by the parties, the Board then concluded that the applicant had not discharged his burden of proof. Specifically, the Board wrote:

> 49 . . . My examination of the facts and of the evidence submitted by the parties did not reveal any signs of discriminatory, arbitrary or bad faith behaviour by the respondent. Nothing that the complainant presented established, on a balance of probabilities, a violation of section 187 of the *PSLRA*. The complainant failed to adduce any independent evidence, documentary or otherwise, proving that the respondent had previously refused to represent him or a reason for that refusal. The respondent denied that it had occurred and was not cross-examined on that issue during his testimony. The complainant did not adduce any evidence or context to support that allegation.
>
> 50 Similarly, the complainant failed to adduce any independent evidence, documentary or otherwise, in support of his argument that the respondent colluded with the employer when he withdrew the bargaining agent's representation.
>
> 51 In addition, nothing in the evidence presented to me led me to conclude that the respondent displayed an uncaring or cavalier attitude toward the complainant's

> interests or that he acted misleadingly or maliciously or with personal hostility. I have no reason to believe that the respondent acted negligently or that he treated the complainant differently from other employees or that any such distinction was based on illegal, arbitrary or unreasonable grounds.
>
> 52 Moreover, I find that the respondent was aware of the circumstances of the grievance and that he possessed all the necessary information to make a decision about the complainant's representation at the second level of the process. I am also satisfied that the respondent examined the circumstances of the grievance, understood its merits and made an informed decision as to whether the bargaining agent should continue to represent the complainant. The respondent's conclusions did not differ from those of the other two union representatives involved in the complainant's case, Mr. Thériault and Mr. Boulanger.

**Analysis**

[11] The standard of review that applies to decisions of the Board regarding fair and equitable representation is reasonableness (*Boulos v. Public Service Alliance of Canada*, 2012 FCA 193; *Beaulne v. Public Service Alliance of Canada*, 2011 FCA 62, leave to appeal to S.C.C. refused, 34256 (September 8, 2011); *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156).

[12] Having carefully analyzed the record, including the exhibits to which the applicant made specific reference in his argument, I am satisfied that the Board's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and [the applicable] law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47). Therefore, in my view, there are no grounds for this Court to intervene in respect of this aspect of the applicant's application for judicial review.

[13] I am also of the view that there are no other grounds for this Court to quash the decision under review and refer the matter back to the Board for rehearing because of an alleged breach of the principles of procedural fairness and natural justice. Nothing in the record gives credence to the applicant's allegations in this regard.

[14] That said, I would like to make a few comments on the applicant's argument before this Court, the full text of which was filed in the record at the hearing.

[15] The applicant took a shot-gun approach, attacking all the persons involved in his case, beginning with the employer's representative, Mr. Vassalo, then turning to the union representatives, Pierre Arcand and Éric Thériault. Mr. Vassalo was accused of engaging in [TRANSLATION] "arbitrary, abusive and disrespectful behaviour" and of abusing his power on multiple occasions, while the other two, supposedly known for their allegiances to management, unlawfully represented the applicant when they had no authority to do so. The Public Service Alliance of Canada (the respondent in the present case) is not left unscathed by the applicant's accusations either. The union is accused of tolerating the irregularities mentioned above and violating its own statutes and by-laws. Its representatives were guilty of colluding with the employer to trample on the applicant's rights and perpetuate the discrimination he had suffered at the hands of the employer.

[16] But the worst accusations are reserved for Board Member Bertrand. According to the applicant, Board Member Bertrand [TRANSLATION] "analyzed [the evidence] superficially with a closed mind and a predisposition for the respondent". He rendered a decision that was

[TRANSLATION] "unreasonable, abusive and contrary to the open courts principle" by rejecting the applicant's evidence, not discussing all his arguments and preferring the evidence of the employer or the union representatives. The Board Member was [TRANSLATION] "wilfully blind". He was hostile and biased in his handling of the evidence and [TRANSLATION] "betrayed the principles of justice". The Board Member even went so far as to [TRANSLATION] "alter [the applicant's] entire argument, suggesting that the argument was short, even immaterial".

[17] Convinced that all these accusations are warranted, the applicant concludes that his fundamental rights under sections 11 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, [TRANSLATION] "were deliberately trampled on by Board Member Bertrand". The applicant states that this left his [TRANSLATION] "confidence in the administration of justice severely shaken". He is therefore seeking a remedy through the courts only out of obligation.

[18] These accusations are very serious, could have far-reaching implications for the persons involved and cannot be allowed to go unchallenged, particularly since they have no basis in the evidence or in the decision of Board Member Bertrand. In this case, it should be noted that Board Member Bertrand is a member of an independent quasi-judicial tribunal.

[19] The Board and its decision makers perform "primarily adjudicative" functions and are expected to observe the standard of impartiality applicable to courts (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at paragraph 27). Moreover, the Board requires that its members adhere to a code of conduct and

guidelines associated with this duty of impartiality (see *Code of Conduct and Guidelines for Members of the Public Service Labour Relations Board* (December 19, 2011), online at Public Service Labour Relations Board < http://pslrb-crtfp.gc.ca/about/codeofconduct_e.asp >). According to this code, a board member must, among other things,

- approach every hearing with an open mind with respect to every issue;
- listen carefully to the views and submissions of the parties and their representatives;
- conduct all hearings expeditiously, preventing unnecessary delays, while ensuring that all parties have a fair opportunity to present their case; and
- explain to an unrepresented party the relevant evidentiary and procedural rules that have a bearing on the conduct of the proceeding.

[20] An objective reading of the decision of the Board Member, who presided over a five-day hearing and carefully reviewed the file, shows that he formed an opinion on the issues in an impartial and independent manner. He was under no obligation to address all the applicant's allegations of wrongdoing in his reasons. It is important to bear in mind that the Board Member's role was to decide a grievance on the basis of the sequence of events discussed above for which the remedy sought was simply [TRANSLATION]"that the employee's application for an assignment as a supervisor at Inland Processing be considered in accordance with the criteria set out in the notice of interest dated November 10, 2009" (Respondent's Record, Volume 1 at page 44). In hearing the case over which he presided, he was allowed to administer the evidence in accordance with the task assigned to him, that is, to dispose of the grievance described above.

[21] Nor can the Board Member be faulted for preferring the versions of the employer and the union representatives over that of the applicant, given the contradictory evidence. That was his role as first-instance decision maker, a role in which he has recognized expertise, hence the deference

owed by this Court to findings of fact made by the Board (*Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98 at paragraphs 44, 49).

[22] In closing, I now turn to the applicant's statement that the entire proceeding surrounding his grievance undermined his confidence in the administration of justice. This is how the applicant sees it. I can respect that, but I do not share his view in this case.

[23] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at paragraph 91, the Supreme Court of Canada notes that

> [a] system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

[24] This informed and reasonable observer is not, as the Supreme Court reminds us in that same case, "a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case" (at paragraph 36).

[25] Applying this analytical framework, I conclude that the facts in this case are not at all likely to raise a reasonable apprehension of bias in a reasonably informed person. In other words, an informed person, viewing the matter realistically and practically and having thought the matter through, would not think that it is more likely than not that the Board Member in this case rendered an unjust decision (*Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and*

*Advertising Activities, Gomery Commission*), 2011 FCA 217, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369).

[26] I would therefore dismiss that application for judicial review with costs.

"Johanne Trudel"

J.A.

"I agree.
Marc Noël, J.A."

"I agree.
Robert M. Mainville J.A."

Certified true translation
Francois Brunet, Revisor

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-91-12 |
| **STYLE OF CAUSE:** | GANDHI JEAN PIERRE v. PUBLIC SERVICE ALLIANCE OF CANADA |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | SEPTEMBER 10, 2013 |
| **REASONS FOR JUDGMENT BY:** | TRUDEL J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>MAINVILLE J.A. |
| **DATED:** | SEPTEMBER 24, 2013 |

**APPEARANCES:**

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|---|---|
| Gandhi Jean Pierre | ON HIS OWN BEHALF |
| Wassim Garzouzi | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l.<br>Ottawa, Ontario | FOR THE RESPONDENT |