Date: 20120831

File: 560-34-54

Citation: 2012 PSLRB 89

Canada Labour Code

Before a panel of the Public Service Labour Relations Board

BETWEEN

SAMANTHA SCHARF

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Scharf v. Canada Revenue Agency

In the matter of a complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Joseph W. Potter, a panel of the Public Service Labour Relations Board

For the Complainant: Herself

For the Respondent: Anne-Marie Duquette, counsel

Decided on the basis of written submissions
filed May 17, June 26 and July 5, 2012.

I. Request before the Board

[1] Samantha Scharf filed a complaint under section 133 of the *Canada Labour Code*, R.S.C., 1985, c. L-2, on February 12, 2009. By letter dated April 20, 2012, she requested that I remove myself from this file. This decision deals with the request for my recusal.

II. Background

[2] Ms. Scharf's complaint is somewhat related to those filed in *Babb v. Canada Revenue Agency,* 2012 PSLRB 47, and *Lapointe v. Canada Revenue Agency,* 2012 PSLRB 48. Initially, this complaint was joined with those in *Babb* and *Lapointe* for evidentiary purposes, and I was appointed a panel of the Public Service Labour Relations Board ("the Board") to hear all three. The Board's Registry ("the Registry") proposed joint hearing dates for the three complaints.

[3] By letter dated September 11, 2009, Ms. Scharf informed the Registry in part as follows:

. . .

> *Please see attached copy of email* [*sic*] *sent to you dated June 12, 2009, where I advised I could not confirm acceptance of your proposed hearing dates as I am presently not at work and dealing with an unresolved illness. . . . When it has been determined I am fit to return to work and participate in a workplace hearing by my attending physician, I will notify you.*

. . .

As a result, Ms. Scharf's complaint was held in abeyance. The complaints in *Babb* and *Lapointe* were also held in abeyance.

[4] On August 16, 2011, the Registry received a letter from Ms. Scharf's counsel at that time, stating in part as follows:

. . .

> *Further to your correspondence of August 10th . . . I have conferred with Ms. Scharf and she is amenable to proceeding with the same accommodations as sought by Mr. Babb.*

. . .

The next day, Ms. Scharf emailed the Registry, to inform that she was no longer represented by counsel. Ms. Scharf stated that she would be self-represented from then on.

[5] At my request, the Registry proposed a pre-hearing conference to discuss hearing dates in September 2011 for Ms. Scharf's complaint and those in *Babb* and *Lapointe*, as the matters were still joined for evidentiary purposes. Ms. Scharf replied via email dated August 18, 2011, stating in part as follows:

. . .

> *Regretfully I am not available.*

. . .

> *It is my intention — as a person who is self representing as well as a person with a disability . . . — to provide my initial presentation via written submission to the Board as I could not possibly do so in a courtroom.*

. . .

[6] By letter dated August 26, 2011, the Registry informed Ms. Scharf that I had severed her complaint from those in *Babb* and *Lapointe*. The Registry's letter stated as follows:

. . .

> *In order to properly accommodate all parties with respect to the adjudication of the above-noted matters, the assigned Board Member has determined that the matter of Ms. Scharf (560-34-54) will be administratively severed from the matters of Mr. Babb and Mr. Lapointe (560-34-52 and 53). Accordingly, the current scheduled hearing dates will be only for 560-34-52 and 53, while the hearing of 560-34-54 will be dealt with separately.*

. . .

[7] I heard the complaints in *Babb* and *Lapointe* in the fall of 2011, and I rendered separate decisions in those matters on April 18, 2012, each based on the distinct evidence and arguments that were presented to me in each case. I dismissed each of those complaints for want of jurisdiction.

[8] In the interim, the respondent requested that Ms. Scharf provide particulars in support of her complaint and Ms. Scharf requested disclosure from the respondent

and accommodation in the form of a written hearing. I ruled that the issue of particulars and disclosure would be addressed in writing and I directed Ms. Scharf to provide the respondent with particulars in support of her complaint before dealing with her request for disclosure. She supplied particulars by letter dated April 20, 2012, in which she also requested as follows:

. . .

> *As a point of fact, yesterday and the day previous to yesterday (April 18 and April 19, 2012), I became aware PSLRB issued decisions to dismiss cases 560-34-52, David Babb vs Canada Revenue Agency, as well 560-34-53, Denis Lapointe vs Canada Revenue Agency. It is noted originally PSLRB made decision to amalgamate those two complaints with my complaint 560-34-54 — that originally these 3 cases were 560-34-52 to 560-34-54, Babb, Lapointe and Scharf vs Canada Revenue Agency. I have reviewed the details of the dismissal of 560-34-53 already and was told about 560-34-52 --- I fully expect PSLRB to dismiss my complaint as well. As I noted in my letter to PSLRB dated September 5, 2012, it appears the outcome of my complaint was pre-determined by PSLRB some time long ago. I fully expect PSLRB will dismiss my complaint similar to dismissing the other two complaints — that dismissal of all the complaints was pre-determined at the onset of filing of same. As a result of the decisions made to dismiss Babb and Lapointe, please note I am making formal motion for Adjudicator Potter to remove himself from Case 560-34-54 Scharf vs CRA. I believe him to be corrupt, biased, and unable to make a decision except for that which I believe to be pre-established — that being to dismiss my case, thereby not allowing for a fair and transparent process. . . .*
>
> . . .
>
> [*Sic* throughout]

III. <u>Summary of the arguments</u>

[9] On my directions, on April 25, 2012, the Registry requested the parties to provide written submissions on the following issue:

> *In accordance with the test set out by the Supreme Court of Canada in* Committee for Justice and Liberty at al. v. National Energy Board et al., *[1978] 1 S.C.R. 369, and* R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, would a person — who has knowledge of all the relevant circumstances and who is able to carry out an open-minded, carefully considered and dispassionately deliberate investigation of this case —*

> *reasonably apprehend that the Board is biased regarding the issues to be determined in the present matter?*

A. <u>For the complainant</u>

[10] Ms. Scharf's written submissions dated May 16, 2012, and filed May 17 read as follows:

> . . .
>
> *Does Mr. Joseph Potter have knowledge of all the relevant circumstances? No — he does not — nor did he when he dismissed affiliated complaints 560-34-52 and 560-34-53 (Babb and Lapointe vs. CRA) April 2012.*
>
> . . .
>
> *. . . I am aware David Babb submitted extensive information to* [the] *Barrister for PSAC* [and she] *sifted through his information and provided PSLRB with a very much diminished version — I am also aware Denis Lapointe did not anticipate he was supposed to submit a novel of information, that his submission was not "complete" either. In that regard, the "Board" member did not have knowledge of all the relevant circumstances in their complaints, however issued* [*sic*] *a decision regardless.*
>
> . . .
>
> *Joseph Potter determination to dismiss 560-34-52 and 560-34-53 without seeking and insisting on disclosure information supports my position that he will do the same thing with my complaint. It is understood more information would have become available during a hearing however that too was prevented from being learned as a result of the dismissal of 2 of the 3 associated files. I have every reason to believe — based on what I learned and know — that my complaint will also be dismissed . . . .*
>
> . . .

[11] Ms. Scharf believes that her complaint will be dismissed as the "particulars" that she provided in support of her complaint do not form the basis of her whole complaint. She feels that, without the benefit of testimony, facts will not be brought to light. On this note, Ms. Scharf wrote as follows:

> . . .
>
> *. . . Joseph Potter cannot possibly dispassionately and carefully consider this complaint — my request for*

> *accommodation was already pre-determined by the "Board" (him) as noted in his email correspondence September 9, 2011, to not be "possible." Joseph Potter noted the improbability of the Board hearing my case given my accommodation need to proceed in writing (as opposed to an in-person or video conference hearing). . . .*
>
> . . .

The September 9, 2011 email to which Ms. Scharf refers is one that I sent to the Registry. It reads as follows:

> . . .
>
> *. . . Ms. Scharf has indicated that the only way she can proceed is by way of written submissions, and the Employer does not agree with this. Given the fact that finding a hearing room does not seem possible for her (hence the need to sever), how can the Board proceed to have her case heard?*
>
> . . .

B. <u>For the respondent</u>

[12] On June 26, 2012, the respondent filed brief submissions on the issue of recusal, which read as follows:

> . . .
>
> *The general principles governing the reasonable apprehension of bias concept was summarized by the British Columbia Court of Appeal in* Taylor Ventures Ltd. (trustee of) v. Taylor*, 2005 BCCA 350 at paragraph 7 as follows:*
>
> *(i) a judge's impartiality is presumed;*
> *(ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;*
> *(iii) the criterion of disqualification is the reasonable apprehension of bias;*
> *(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;*
> *(v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;*

(vi) the test requires demonstration of serious grounds on which to base the apprehension;
(vii) each case must be examined contextually and the inquiry is fact-specific.

In Bennett v. British Columbia (Superintendent of Brokers), *[1994] B.C.J. No. 2489 (C.A.) (QL), Justice Taylor from the British Columbia Court of Appeal ruled that the fact that a decision-maker is asked to reconsider an issue that has been raised before him or her in a previous case does not create a reasonable apprehension of bias. He writes at paragraph 19:*

The answer surely must be that if the decision-maker has decided the matter properly in the first place, that is to say free from extraneous or other improper influence-- and in light of the previous decision of this court there can now be no suggestion here to the contrary--then the fact that the second decision turns out to be the same as the first will show no more than that the decision-maker continues to have the same view as before of the law and evidence. That surely has nothing to do with bias. There may well be an apprehension of consistency of judgment when the same matter is raised for the second time before a judicial or quasi-judicial decision-maker, and the party against whose interest the first decision went will understandably prefer for that reason that the matter be considered the second time by someone else, but surely it is impossible that a reasonable apprehension of consistency in judgment on the part of a decision-maker in dealing with the same matter a second time can be equated with reasonable apprehension of bias. The first is an apprehension that the decision-maker will again see the law and evidence in the same way as on a previous occasion; the second is an apprehension that the decision-maker will ignore law or evidence and decide instead on the basis of extrinsic and improper considerations.

On this point, see also: (1) Wewaykum Indian Band v. Canada,*;*
(2) D.M.M. v. T.B.M.*;*
(3) Marchment & Mackay v. Ontario (Securities Commission), *[2002] O.J. No. 2840 (D.C.) (QL);*
(4) Decision No. WCAT-2006-02830*, 2008 LNBCWCA 43;*
(5) Various Property Owners v. Calgary (City), *[2006] A.M.G.B.O. No 120 (Alberta Municipal Government Board) (QL);*
(6) Brighten (Re)*, 2005 LNBCSC 529;*
*(7)*Lee v. Toronto Hydro, *[1997] O.L.R.D. No. 4159 (Ontario Labour Relations Tribunal) (QL);*
(8) Nova Scotia (Department of Transportation) and C.U.P.E., Loc. 1867, Re, *[1990] N.S.L.A.A. No.20 (Nova Scotia Labour Arbitration Board) (QL).*

. . .

[*Sic* throughout]

C. Complainant's rebuttal

[13] Ms. Scharf rebuttal, dated July 4, 2012 and filed July 5, reads as follows:

. . .

> *My "position" re recusal of Joseph W. Potter was provided May 16, 2012, by letter to all the parties.*
>
> *I understand Mr. Potter has assigned himself to be the decision maker* [*sic*] *in the review of himself and my request for his recusal. I have nothing further to add to my submission in this regard.*

. . .

IV. Reasons

[14] In her request for recusal, Ms. Scharf stated that she believes that I am unable to make a decision based on the merits of her complaint and that it necessarily follows that I will dismiss her complaint for the same reasons as in *Babb* and *Lapointe*. Ms. Scharf noted that the complaints in *Babb* and *Lapointe* were similar to hers.

[15] A similar request for recusal was dealt with by an adjudicator in *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 8. At paragraphs 25 to 27, the adjudicator wrote as follows:

> *[25] To dispose of the request for recusal, I am guided by the jurisprudence on reasonable apprehension of bias.* Committee for Justice and Liberty et al. *established the applicable principles:*
>
> . . .
>
> > . . . 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 . . . "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 Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

. . .

> *[26]* Adams v. British Columbia (Workers' Compensation Board) *(1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.) explained the type of evidence required to demonstrate an appearance of bias:*
>
> . . .
>
> > sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it *[the allegation]* is made will not bring an impartial mind to bear . . . suspicion is not enough.
>
> . . .
>
> *[27] Therefore, the grievor must demonstrate that beyond mere suspicion, in all probability a reasonable and well-informed person would believe that I am biased and that I would not decide this case fairly. In support of his request, the grievor referred to incidents that occurred during the six days of the hearing. I will comment on those incidents and assess, as a reasonable person would do, if they contain grounds to support the allegation of bias.*

[16] More recently, another adjudicator had to deal with a request for recusal and enunciated the applicable principles as follows in *Exeter v. Deputy Head (Statistics Canada)*, 2012 PSLRB 25, at paragraphs 27 and 28:

> *[27] What constitutes a reasonable apprehension of bias has been the subject of several court decisions. In the seminal decision of the Supreme Court of Canada in* Committee for Justice and Liberty et al. v. National Energy Board et al., *[1978] 1 S.C.R. 369, Justice de Granpré, dissenting on the merits, crafted at pages 394-395 the following definition of what constitutes the apprehension of bias that still endures:*
>
> . . .
>
> > ... [*sic*] 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... [*sic*] that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through - conclude."
> >
> > I can see no real difference between the expressions found in the decided cases, be

> they 'reasonable apprehension of bias', 'reasonable suspension of bias' or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> . . .
>
> *This excerpt suggests that the test of what constitutes a reasonable apprehension of bias is dependent on the facts of the case as well as the circumstances and the proceedings taken as a whole.*
>
> *[28] In* R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court of Canada outlined the following considerations as relevant to who constitutes an unbiased decision maker and what he or she should consider:*
>
> > *1) a well-informed person who has knowledge of all the relevant circumstances (page 531);*
> >
> > *2) a person able to carry out an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case (page 506); and*
> >
> > *3) the question of whether there is reasonable apprehension of bias must be analyzed with a complex and contextualized understanding of the issues of the case (page 509).*

[17] Although the complaints in *Babb* and *Lapointe* were dismissed for lack of jurisdiction, each decision was based on the specific evidence and arguments presented at the hearing. That is exactly what any trier of fact must do — analyze the evidence and the arguments presented by the parties and issue a decision based on that evidence and the law. A different set of facts may, or may not, lead to a different outcome, depending entirely on the law applicable to those facts. I believe that a reasonable person would not conclude that, although Ms. Scharf is of the view that her complaint is similar to those in *Babb* and *Lapointe*, it necessarily follows that her complaint will be dismissed without regard to the merits of her case.

[18] I note that Ms. Scharf's complaint has already been handled differently than those in *Babb* and *Lapointe*: her complaint has been severed from those in *Babb* and *Lapointe* because her circumstances are different than those in *Babb* and *Lapointe*. That explains, in part, why no decision has yet been made on the merits of her case.

Further, her own request for disclosure is still outstanding.

[19] In this case, I am of the view that, in the words of the Federal Court of Appeal referred to in *Committee for Justice and Liberty et al.*, Ms. Scharf's concerns are "... related to the 'very sensitive or scrupulous conscience'." Each of *Babb* and *Lapointe* was decided on its own set of facts and the law applicable to them. When Ms. Scharf presents her case, a decision will be made on the basis of the facts and arguments presented by Ms. Scharf and the respondent. I find that, in all probability, there is no basis to state that a person — who has knowledge of all the relevant circumstances and who is able to carry out an open-minded, carefully considered and dispassionately deliberate investigation of this case — would reasonably apprehend that this panel of the Board is biased regarding the issues to be determined in the present matter and that evidence and arguments that Ms. Scharf will present in support of her case would be ignored. Finally, I find comfort in the following views expressed by the British Columbia Court of Appeal at *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350, para 9:

> *[9] Any reasonable, well informed person would accept the judge's assurance that he would decide the case only on the evidence admitted at the trial. This duty is so basic to the judicial function that the appellant's concern amounts to nothing more than groundless suspicion.*

[20] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[21] The request for recusal is dismissed.

August 31, 2012.

Joseph W. Potter,
a panel of the Public Service
Labour Relations Board