Files: 166-2-28144

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN RICHARD McELREA

Grievor

and

TREASURY BOARD
(Industry Canada)

Employer

Before: Jean Charles Cloutier, Board Member

For the Grievor: Pascale-Sonia Roy, Counsel and Lyette Babin, Professional Institute of the Public Service of Canada

For the Employer: Kathryn A. Hucal, Counsel

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Heard at Ottawa, Ontario
March 23 to 26 and September 8, 1998;
and January 11 to 12 and February 4 and 5, 1999

On July 14, 1997, Mr. McElrea, the grievor, grieved a two-week suspension without pay, which the employer had imposed on him. This grievance was referred to adjudication on October 2, 1997. The hearing of this case began before me on March 23, 1998 and continued from March 24 to 26, 1998. The grievor was represented at the hearing by his bargaining agent.

On March 26, 1998, the grievor's bargaining agent requested an adjournment in order to obtain the services of counsel to represent the grievor for the remainder of the hearing. On April 2, 1998, the Board's Assistant Secretary informed the parties of the following:

. . .

> *. . . The adjudicator after considering the arguments of the parties granted the adjournment on the condition that the hearing of this matter would proceed and continue at the point where the hearing was adjourned.*

. . .

The hearing of this case continued on September 8, 1998, at which date the grievor's counsel presented a written request for leave to re-open the cross-examination of the employer's witnesses that had been heard up to that date. Another adjournment was granted, to allow the employer to respond in writing to the request. I denied the grievor's counsel's request by decision dated November 4, 1998.

The hearing resumed on January 11, 1999 and continued on January 12, 1999.

On February 1, 1999, the grievor's counsel sent me a letter, by fax, raising concerns regarding my handling of the evidence and of procedural matters. The hearing reconvened on February 4, 1999, at which time I invited both counsel to join me in Chambers. The purpose of this meeting would have been to discuss the concerns raised in the letter of February 1, 1999. Counsel for the grievor refused to join me in Chambers and informed me that she was under instructions from her client not to meet with me. The hearing resumed shortly thereafter and the grievor's counsel did not raise at that time any of the concerns she had raised in her letter.

The hearing continued on February 5, 1999. On this last date, the grievor's counsel presented a motion for my recusal. She submitted that she had been instructed to request my removal from the case because of the way I was conducting the hearing. She referred, in a general manner, to decisions I have made regarding the admissibility of evidence and procedural matters. She also alleged that I had behaved in a way that favoured or appeared to favour the employer and that I demonstrated that I am unable to approach this matter in an impartial manner. She added that the grievor was therefore being deprived of a fair hearing.

The employer's counsel opposed the motion. She stated that there was no indication or appearance of bias on my part and that, in fact, if anything, I had demonstrated an incredible amount of patience and indulgence towards the grievor's counsel. She argued that the motion appeared to be yet another attempt or tactic by the grievor's counsel to delay a process that is meant to be expeditious and an effective alternative to civil litigation.

I informed the parties that I would deal with the motion by way of a written decision.

Reasons for Interim Decision

The hearing in this case had not been a smooth one: a great many objections have been raised by both counsel, who, in their dealings with each other, as well as with me as an adjudicator, have not always behaved in the civil and orderly fashion one might expect from members of the legal profession. Numerous requests and motions of all kinds have been made so far, including one relating to the position of tables in the hearing room.

In her motion for my recusal, counsel for the grievor did not refer me to any specific instance where my handling of the procedure or of the evidence would have been inappropriate or unfair to her client. However, she has raised concerns of that nature in her letter of February 1, 1999. I should point out that such conduct is inappropriate. Questions of evidence and process should be dealt with during the hearing in a timely manner, so that all concerned may properly debate the issues.

One cannot expect adjudicators to be merely passive and not to intervene in the hearing process, the purpose of which is to make them aware of the issues relating to the case they have to decide and to insure they understand the evidence presented to them and the positions the parties are advancing. I agree that such intervention should not be excessive and should not prejudice the case of any party.

What the grievor's counsel is essentially arguing is that my conduct in this case has created a reasonable apprehension of bias. In *Samson Indian Nation and Band v. Canada*, [1998] 3 F.C. 3, upheld by the Federal Court of Appeal, Teitelbaum J. reviewed the jurisprudence relating to reasonable apprehension of bias. I believe it appropriate to reproduce here the extract of his judgement found at pages 19 to 23.

. . .

THE LAW

The Test for Reasonable Apprehension of Bias

[19] The genesis for the modern formulation of the test is contained in the dissenting judgment of de Grandpré J. in Committee for Justice and Liberty et al. v. National Energy Board et al., *[1978] 1 S.C.R. 369, at page 394 (hereinafter* Committee for Justice*):*

> *. . . 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".*

[20] There is some question about the degree of knowledge which this reasonable person possesses. In Committee for Justice, *de Grandpré J. referred to an "informed person" at page 394 as being the "reasonable" person.*

[21] An oft-quoted passage on the subject is by Lord Denning in Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon, *[1968] 3 All E.R. 304 (C.A.), at page 310:*

> *. . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.*

> *Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand [cited cases omitted]. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough [cited cases omitted]. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."*
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> *[Underlining by Teitelbaum J.]*

[22] Although the situations where a judge should be disqualified necessarily depend on the level of generality one chooses, there are several situations which seem to crop up on a regular basis. In Energy Probe v. Atomic Energy Control Board, *[1985] 1 F.C. 563 (C.A.), affg [1984] 2 F.C. 227 (T.D.), Marceau J.A. suggested at page 580 that the following circumstances would typically disqualify a judge:*

> *. . . kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc.*

[23] Several cases have sounded a warning that a judge should not easily accept an application to recuse. Chief Justice McEachern made the following observation in G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd. *(1992), 74 B.C.L.R. (2d) 283 (C.A.), at page 287:*

> *A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to ensure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.*

> *[24] On a similar note, the British Columbia Court of Appeal in* Middelkamp v. Fraser Valley Real Estate Board *(1993), 83 B.C.L.R. (2d) 257 (C.A.), stated the following, at page 261:*
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> > *As I believe the Chief Justice of this Court has said on more than one occasion, a trial is not a tea party. But bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.*
> >
> > . . .
> >
> > *Bias does not equate with what might be found in the end to be an unsatisfactory trial.*
> >
> > *[Underlining by Teitelbaum J.]*
>
> *[25] Thus, as Hoyt J.A. stated in* Blanchard v. Canadian Paper Workers' Union, Local 263 et al. *(1991), 113 N.B.R. (2d) 344 (C.A.), a decision to disqualify should "only be exercised sparingly and in the most clear and exceptional cases" (at page 351).*
>
> *[26] In cases where the test for bias is not satisfied, the Court in* Mattson v. ALC Airlift Canada Inc. *(1993), 18 C.P.C. (3d) 310 (B.C.S.C.) noted that the judge will continue to sit on the trial to its conclusion despite unhappiness on the part of counsel or parties over the conduct of the trial.*
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> . . .
>
> [Underlining by Teitelbaum J]

Teitelbaum J. then referred to *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at pages 530-532, where Cory J., rendering judgement for himself and Iacobucci J., also reviewed other cases dealing with the issue of reasonable apprehension of bias.

I accept the review of the jurisprudence made by Teitelbaum J. and I share the position taken by the Courts on this issue. I further note that, in *Samson Indian Band v. Canada*, unreported (Court File Nos. A-893-97, A-895-97, A-70-98 and A-71-98, dated May 15, 1998), the Federal Court of Appeal adopted a reserved approach in disposing of the appeal of the above-mentioned decision of Teitelbaum J. Isaac C.J. stated the following for the Court:

. . .

> *In our view, what the appellants seek in these appeals is the removal of Teitelbaum J. as Trial Judge and his replacement by a judge of their own preference to preside over what are admittedly two important trials. This approach to the selection of a Trial Judge is foreign to the practice of this Court. We do not wish to encourage it in any way.*

. . .

I have considered the way in which I have allowed the presentation of evidence. I am satisfied that I have dealt with the evidence the parties were trying to adduce in a manner that was appropriate at the time and in the circumstances. I am not bound to admit all of the evidence the parties would like to adduce. In that regard, I wish to point out that some of the evidence counsel for the grievor wanted to adduce, and that had initially not been allowed, was admitted once she had convinced me of its relevance.

At page 5 of her letter of February 1, 1999, counsel for the grievor objected to the fact that I had ordered that exhibits G-38 and G-39 be withdrawn and that all of the testimony of Ms. Langa-Barona in relation to them be disregarded. Counsel for the grievor omitted to specify that these two exhibits were photocopies of printouts of e-mail messages, each containing parts of more than one message. The reason for withdrawing these exhibits at that time was that their content was, in part, unidentified and confusing. I invited counsel for the grievor to provide, the next day, better copies of the messages she wanted to adduce in evidence, at which time Ms. Langa-Barona could have testified in relation to them. The said documents have not since been re-introduced.

At page 5 of her letter of February 1, 1999, counsel for the grievor also referred to the fact that she had asked me during the hearing to order Ms. Langa-Barona to produce any documents that she has in her possession and that pertain to her employment at "IBOC", including documents relating to her participation at a Facilitation Exercise of June 1996, her interviews with a Ms. Peck during the investigation of the harassment complaint against the grievor and her interviews with a Ms. Audrey Sullivan. I have already apprised counsel for the grievor of her right to

summons Ms. Langa-Barona as her own witness and compel her to bring with her the said documents. I provided counsel for the grievor with summons forms to that effect.

At page 2 of her letter of February 1, 1999, counsel for the grievor also raised the fact that I should remove witnesses from the hearing room during objections on their testimony. Adjudicators appointed under the *Public Service Staff Relations Act* do not, as a general rule, exclude witnesses during decisions on objections, nor should this be done as a matter of course, as seems to be suggested by counsel for the grievor. It is the responsibility of counsel in each case, where appropriate, to ask for the exclusion of a witness during deliberations on an objection by either counsel.

I have also considered the way the hearing has unfolded and the manner in which I have handled it. I am satisfied that I have acted in an appropriate manner and that the grievor's case has not been prejudiced in any way. I wish to state clearly and unequivocally that I have not pre-judged this case in any way; I decide each case I hear on the basis of the totality of the evidence and submissions put before me and the legal principles applicable. I do not believe that, as de Grandpré J. put it in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, *supra*, ". . . an informed person, viewing the matter realistically and practically–and having thought the matter through–[would] conclude . . . ." that my conduct could have given rise to a reasonable apprehension of bias.

For all these reasons, I dismiss this motion for recusal.

Jean Charles Cloutier,
Board Member

OTTAWA, February 11, 1999.