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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

DANIEL POIRIER

Grievor

and

DEPUTY HEAD

(Department of Crown-Indigenous Relations and Northern Affairs)

Respondent

Indexed as

*Poirier v. Deputy Head (Department of Crown-Indigenous Relations
and Northern Affairs)*

In the matter of an individual grievance referred to adjudication

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Grievor: Pierre Brabant, counsel

For the Respondent: Karl Chemsy, counsel

Heard by videoconference,
December 18, 2023.
[FPSLREB Translation]

REASONS FOR DECISION

FPSLREB TRANSLATION

I. Request before the Board

[1] This decision is about a recusal request made by Daniel Poirier (“the grievor”), which he submitted in writing on December 14, 2023. The parties had the opportunity to present their arguments on the request at a pre-hearing conference on December 18, 2023.

[2] The hearing of the grievance on its merits is scheduled for January 15 to 19, 2024.

[3] The grievor argued that there was a reasonable apprehension of bias on my part since one of the witnesses for the respondent, which was the Department of Indian Affairs and Northern Development (“the employer”) and is now the Department of Indigenous and Northern Affairs, who signed the grievor’s dismissal letter while she was in a position at the department implicated in the grievance, is now the executive director of the Secretariat to the Federal Public Sector Labour Relations and Employment Board (FPSLREB or “the Board”).

[4] The employer submitted that the request is unfounded and frivolous. There is no connection between the person who signed the dismissal letter and the FPSLREB, which is an independent administrative tribunal. It is indeed a recusal request for the entire Board because the potential witness is the FPSLREB Secretariat’s executive director, which is illogical, given the Board’s independence.

[5] For the following reasons, I dismiss the recusal request. Although one of the employer’s potential witnesses currently works for the FPSLREB’s Secretariat as its executive director, the Board is an independent administrative tribunal that does not report to the FPSLREB’s Secretariat. The impartiality of all Board members is a prerequisite for appointment. That said, as a decision maker, I have never discussed this or other files with the executive director of the FPSLREB’s Secretariat.

[6] The grievor failed to demonstrate that I have a connection with the executive director, personal or otherwise, which would demonstrate a reasonable apprehension of bias. Especially since, no matter the result on the merits, I have nothing to gain from the fact that one of the employer’s witnesses is the FPSLREB Secretariat’s executive director.

[7] Clearly, the grievor failed to discharge his burden of demonstrating a reasonable apprehension of bias by "... an informed person, viewing the matter realistically and practically ..." (see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369).

II. Summary of the arguments

[8] A summary of the parties' arguments is provided in the following paragraphs.

[9] The grievor's December 14, 2023, letter with the recusal request reads in part as follows:

[Translation]

...

Recusal request

Any party to a dispute has the right to be heard by a judge who is impartial and free from a reasonable apprehension of bias.

As noted in the Code of Conduct and Guidelines for Members of the FPSLRB, the question is not whether the judge has in fact demonstrated conscious or unconscious bias but whether a reasonable and knowledgeable person would be apprehensive of the judge's bias.

In this case, Daniel Poirier's dismissal letter was signed by Jennifer Hamilton, who was, at the time, the senior director, client services, human resources.

It appears that Jennifer Hamilton is now the executive director of the FPSLRB Secretariat and that her office address is the same as the Board's. Mandate and Member Services, Legal Services, Mediation and Dispute Resolution Services, and Registry Services report to her. Véronique Thouin-Jung, Registry Officer, wrote to us about the Board's composition.

With all due respect, we raise a reasonable apprehension of your bias in this matter because of an apparent conflict of interest due to Jennifer Hamilton's duties.

In light of the preceding, we ask you to recuse yourself.

Thank you for your attention to this letter, and please accept our most sincere greetings, Ms. Harewood.

...

[10] When it responded orally to the grievor's letter at the pre-hearing conference on December 18, 2023, the employer noted that there was no connection with the person

who signed the dismissal letter and who now works in a secretariat that is independent of the Board and the Board Member.

[11] The employer submitted that if the grievor's logic is taken to its extreme, it is a request to recuse the entire tribunal, as the executive director is employed by the Administrative Tribunals Support Service of Canada (ATSSC). According to the employer's counsel, this fact alone would raise a conflict of interest.

[12] The employer submitted that the Board cannot recuse itself in its entirety, especially since it is independent of the FPSLRB Secretariat. The employer cited the applicable test, set out in *Committee for Justice and Liberty* and recently reproduced in *Shura v. Chairperson of the Parole Board of Canada*, 2020 FPSLRB 26 at para. 153.

[13] At the pre-hearing conference, the grievor responded that he understood the difference between bias and the appearance of bias. He admitted that it is extremely difficult to demonstrate bias.

[14] The grievor added that because the Board Member works with the executive director, who will testify at the hearing, there is a reasonable apprehension of bias.

[15] The grievor is concerned that there is an apprehension of bias and that instead the solution is to appoint an outside adjudicator, whom both parties will choose.

III. Analysis

[16] The Board has ruled repeatedly on recusal requests. So far, they have been dealt with by the Board member hearing the case (see *Shura*, at para. 152). In *Committee for Justice and Liberty*, the Supreme Court of Canada set out the test for determining whether there is a reasonable appearance of bias. This criterion is set out at page 394 of that case, which reads in part as follows:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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..."

[17] This analysis has been adopted in several Board decisions (see *Nelson v. Canadian Security Intelligence Service*, 2012 PSLRB 65 at para. 9; *Shura*, at paras. 153 and 154; and *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 178 at para. 25).

[18] Any recusal request must be treated seriously, and this case is no exception. I do not find it frivolous.

[19] However, the party making such a request may not do it without sufficient evidence (see *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at para. 13). While the appearance of administrative decision makers' impartiality is a pioneering principle of our quasi-judicial system, the fact remains that a request that challenges that presumed impartiality should be rigorous.

[20] The grievor requires that the entire Board recuse itself from the file because, personally, he fears that there is an appearance of bias, given the executive director's duties and her relationship to the Board.

[21] In this case, the grievor failed to establish a reasonable apprehension of bias, for several reasons.

[22] First, while the FPSLREB Secretariat's executive director leads the support services to the Board, as a Board member, I am an independent and impartial decision maker. I am part of an administrative tribunal that is independent of the FPSLREB Secretariat, which is part of the federal public administration.

[23] The Board's composition is defined in its enabling legislation, the *Federal Public Sector Labour Relations and Employment Board Act (FPSLREBA)*. The Board consists of 1 chairperson, not more than 2 vice-chairpersons, not more than 12 Board members, and such part-time Board members as the Governor in Council considers necessary.

[24] Section 6(4) of the *FPSLREBA* provides that every Board member is required to act impartially. Therefore, impartiality is a condition of appointment, and it goes without saying that each Board member must act impartially at all times.

[25] Second, examining the matter in depth, I do not see any reasonable apprehension of bias or apparent conflict of interest on my part because of the duties of the FPSLREB Secretariat's executive director.

[26] By claiming that I work with the FPSLREB Secretariat's executive director, it appears that the grievor is unaware of the Board's independent structure. It does not report to its Secretariat's management, and it manages its own files. Section 25 of the *FPSLREBA* provides this:

25 The Chairperson has supervision over and direction of the Board's work, including

(a) the assignment and reassignment of matters that the Board is seized of to panels;

(b) the composition of panels; and

(c) the determination of the date, time and place of hearings.

25 Le président assure la direction de la Commission et en contrôle les activités, notamment en ce qui a trait :

a) à l'assignation et à la réassignation aux formations des affaires dont la Commission est saisie;

b) à la composition des formations;

c) à la fixation des date, heure et lieu des audiences.

[27] In addition, the *Administrative Tribunals Support Service of Canada Act* (S.C. 2014, c. 20, s. 376; *ATSSCA*) specifies its mandate at paragraph 10, which is to provide each administrative tribunal set out in the *Act*, including the Board, with the support and installation services it requires. Read together, ss. 12 and 13 of the *ATSSCA* provide that the powers of the chief administrator and his or her delegates do not extend to the powers of a tribunal or any of its members.

[28] To strengthen the administrative tribunals' independence, s. 14 of the *ATSSCA* provides, "For greater certainty, the chairperson of an administrative tribunal continues to have supervision over and direction of the work of the tribunal."

[29] Thus, given the Board's clearly independent structure and its control over its direction and activities, it and the Board member in particular have nothing to gain or lose, no matter the result on the merits. This case is like any other, and I will give each party an opportunity throughout the process to be heard in a fair, equitable, and above all impartial manner.

[30] Contrary to the grievor's contention, I am not working on this or other files with the FPSLREB Secretariat's executive director. I have no discussion or contact with the executive director on this file. The same is true of all my files. Thus, despite physical proximity (the fact that the offices have the same address), the grievor did not

demonstrate a proximity or a conflict of interest that meets the burden required by *Adams*.

[31] This situation is easily distinguished from the proximity described in the decision of the Tribunal administratif du travail du Québec, *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS) v. Comité patronal de négociation du secteur de la santé et des services sociaux Gouvernement du Québec*, 2023 QCTAT 3534, which the grievor cited. In that decision, the tribunal granted the recusal request because the respondent had succeeded in proving that there was a reasonable apprehension of bias based on several factors, including 1) the actual proximity of the Administrative Judge to the Judge's son, who was a partner in the firm representing the union in the complaints of interference with union activities and of bargaining in bad faith, 2) the size of the union that the son frequently represented, and 3) the fact that the decision that the Administrative Judge was to make on the merits could have resulted in a gain or loss for the son's firm. I am sure that this case is a long way from that one.

[32] With respect to the recusal request before me, a well-informed person, studying the matter in depth and realistically and practically, would not conclude that there is a reasonable apprehension of bias on my part.

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

(The Order appears on the next page)

IV. Order

[34] The application is dismissed.

[35] The hearing will proceed as scheduled.

December 20, 2023.

FPSLREB Translation

**Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board**