Federal Court  Cour fédérale

Date: 20181109

Docket: T-333-18

Citation: 2018 FC 1133

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 9, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

TRANSPORT CAR-FRÉ LTÉE

Applicant

and

DAVID LECOURS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, a company specializing in the ground transportation of motor vehicles, is challenging, through this judicial review, the decision of an adjudicator appointed under Part III of the *Canada Labour Code*, RSC 1985, c L-2 [Code] allowing, on November 21, 2017, a complaint for unjust dismissal brought under the Code by the respondent, a former employee of

the applicant's. More specifically, the adjudicator, in addition to finding that the respondent had been unjustly dismissed, ordered that he be reinstated in the applicant's workforce and ordered the applicant to pay the following amounts to the respondent: (i) $296,883.91 as partial compensation for lost wages since the dismissal; (ii) $25,000 as compensation for moral damage; and (iii) $25,502.03 to reimburse professional fees and expenses incurred as of January 15, 2018.

[2] The applicant submits that the adjudicator's decision should be set aside on the grounds that it was rendered in breach of the rules of procedural fairness and natural justice. In particular, the applicant criticizes the adjudicator for having decided the matter when the presentation of the evidence had barely begun and a formal request for recusal, a request that was never dealt with and that was based on conduct in the course of the proceedings interpreted by the applicant as signs of bias, was pending before him.

[3] For the reasons below, I find that this application for judicial review should be allowed, the adjudicator's decision set aside and the matter remitted to a differently constituted arbitration tribunal under the Code for redetermination.

II. Background

A. The respondent's dismissal

[4] The respondent was hired by the applicant in August 2008 as a delivery driver. In January 2010, he suffered from a lumbar strain injury, which required him to stop working. A few months later, on May 26, 2010, he returned to work, but, on the advice of his physicians,

asked for a progressive return to work to ensure his complete recovery. Among other things, he asked not to be given long-distance assignments right away. According to the respondent, this request was not granted, resulting in a relapse on June 9, 2010, and a second work stoppage.

[5] In the days following the new work stoppage, the applicant surprised the respondent while the latter was performing physical labour in his home. It therefore did not believe that he was unfit for work. Relations between the parties soured; in the months that followed, they brought their dispute before the Quebec authorities charged with the administration of the *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001 [ARIAOD], the respondent alleging that he had suffered from reprisals by the applicant for asserting his rights under that legislation, while the applicant challenged the relapse.

B. The respondent's complaints of unjust dismissal

[6] On October 31, 2010, the respondent filed a complaint under the Code. He argued that he had been unjustly dismissed for having asserted his rights under the ARIAOD. On February 15, 2011, the federal Minister of Labour referred the complaint to adjudication and assigned Nicol Tremblay, a lawyer, as adjudicator.

[7] The respondent also filed a complaint regarding his dismissal with the Commission de la santé et de la sécurité au travail du Québec [CSST]. He did this under section 32 of the ARIAOD. This led to a dispute between the parties regarding whether the CSST had jurisdiction to hear the respondent's complaint. That dispute was resolved on June 3, 2013, when the CSST declared itself to be constitutionally without jurisdiction to dispose of the complaint, section 32

of the ARIAOD being, in its view, inapplicable to the applicant because of the nature of its activities, which transcend Quebec's borders.

C. The hearing before Adjudicator Tremblay

[8] The proceedings before Adjudicator Tremblay began in the spring of 2014, when he summoned the parties to a hearing. It is my understanding that the purpose of this hearing was to debate two preliminary objections, both raised by the applicant. The first involved the employer's identity, the applicant arguing that the complaint had not been brought against the correct corporate entity and therefore had to fail. The second involved the prescription of the remedy and challenged the date of the dismissal, on which the parties did not agree. The applicant claimed to have dismissed the respondent on June 21, 2010, and concluded that the complaint was therefore prescribed on its face because, pursuant to the Code, it had to be filed within 90 days of the dismissal, or no later than the third week of September 2010, which was not done.

[9] The respondent, on the other hand, claimed that he had been dismissed on October 28, 2010, and submitted that his complaint had been filed well within the timeframe prescribed by the Code.

[10] These issues were taken under advisement by Adjudicator Tremblay, but he died before rendering his decision.

D. The appointment of a new adjudicator and the proceedings leading to the impugned decision

[11] On October 19, 2016, the federal Minister of Labour appointed a new adjudicator, Jean-Claude Bernatchez, to dispose of the respondent's complaint. It was Mr. Bernatchez who rendered the adjudicator's decision that is the subject of this judicial review.

[12] To accommodate the applicant's principal representative, Réal Blanchette, who planned to spend the winter of 2016–2017 in Florida, Adjudicator Bernatchez [the Adjudicator] scheduled the first day of hearings of the respondent's complaint for April 26, 2017.

[13] At the start of the hearing, Mr. Blanchette, who was self-represented at the time, asked the Adjudicator to suspend the proceedings pending a decision from the federal Minister of Labour in response to the applicant's request to have the respondent's complaint dismissed because it had been outstanding for too long. The hearing proceeded regardless.

[14] On the first day of hearings, the Adjudicator, according to the evidence in the record, heard the respondent's testimony. According to his decision, he also heard the testimony of Mr. Blanchette, a fact contested by the applicant.

[15] At the end of the first day, Mr. Blanchette stated that he wished to retain legal counsel. With some reluctance, given the time that had passed between the convening of the hearing and the filing of the complaint, the Adjudicator agreed to the request and suspended the hearing until the following afternoon. When the hearing resumed, Mr. Blanchette was accompanied by a

lawyer, but one who claimed to have no particular expertise in labour law. He therefore requested a postponement of three weeks to find a lawyer specializing in the field.

[16] The lawyer did not follow up with the Adjudicator. A month after the postponement granted to the applicant, the Adjudicator summoned the parties to continue the hearing. It was to resume on June 13, 2017. Shortly before that date, a new lawyer announced that he would be representing the applicant. This lawyer, Jean-François Dolbec, citing a scheduling conflict, requested a postponement. At the same time, he informed the Adjudicator that he would be raising the same preliminary objections raised by his client before Adjudicator Tremblay. The Adjudicator, again with some reluctance, allowed the request for a postponement. He scheduled the resumption of the hearing for August 16, 17 and 18, 2017.

[17] The hearing resumed, as scheduled, on August 16, 2017. It was at this point that the relations between the Adjudicator and the applicant became complicated. From the outset, counsel for the applicant, Mr. Dolbec, as he had already indicated he would, reiterated the two preliminary objections raised before Adjudicator Tremblay, thereby opposing the respondent's being allowed to make submissions on the aspect of his complaint relating to the remedy. The respondent's claims included an amount of $650,000 in compensation for lost wages since the termination of the employment relationship.

[18] The Adjudicator nevertheless allowed the production of this evidence, which consisted mainly of financial statements of companies operated by the respondent since he ceased to be employed by the applicant.

[19] Following the production of this evidence, the respondent was cross-examined by counsel for the applicant. The cross-examination began on August 16 and continued the next day. On the afternoon of August 17, the applicant called Fernand Maltais, the company's financial controller, whom it considered to be its first witness. The applicant later indicated that it also wished to produce the testimony of Mr. Blanchette and the latter's son, Guillaume, who was a supervisor working for the company, and of a professional accountant.

[20] The hearing was adjourned at the end of the session of August 17. The primary purpose of the adjournment was to allow counsel for the applicant to cross-check the evidence of loss of income produced by the respondent. It was at this point that Mr. Dolbec asked counsel then representing the respondent to disclose a certain number of documents. Four boxes of documents were eventually sent to him. According to the correspondence exchanged between counsel at that time, the disclosure of certain documents continued to be a contentious issue.

[21] Mr. Dolbec also asked the Adjudicator to issue summons to the employers and companies with whom the respondent—or his companies—had done business over the course of the period covered by the respondent's claim for lost income. This request was denied by the Adjudicator, who, by way of reasons, reminded Mr. Dolbec that in a prior matter over which he had presided, he had upheld Mr. Dolbec's own objection to a similar request made by the union representative.

[22] Two days before the hearing was to resume on October 27, 2017, counsel for the applicant informed the Adjudicator that his client had engaged the services of a court reporting firm for the rest of the hearing. At the same time, he informed the Adjudicator of his intention to

examine the respondent with respect to the documents the disclosure of which he had requested several weeks earlier.

[23] In an email that he addressed to Mr. Dolbec the following day, October 26, the Adjudicator first refused to authorize the presence of a court reporter on the grounds that such a request should have been made at the beginning of the hearings to ensure procedural consistency throughout. Later that day, he changed his mind and announced that he was prepared to grant Mr. Dolbec's request on the condition that the court reporter be an [TRANSLATION] "informal" court reporter, that is, a person taking notes on a party's behalf.

[24] This change of position followed a letter addressed to him by Mr. Dolbec the same day, in response to the above-cited email. In that letter, Mr. Dolbec informed the Adjudicator of his intention to apply for judicial review if he maintained his refusal to authorize the presence of a court reporter. Mr. Dolbec's letter also included a number of other complaints about the adjudication proceedings going back to the first day of hearings. Mr. Dolbec invited the Adjudicator to consider this letter to be [TRANSLATION] "a formal request for recusal in light of your evident bias in this case in which you are refusing or complicating every step taken by our client to obtain fair proceedings that are in accordance with the principles of natural justice" (Applicant's Record, vol. 1, at p 188). The Adjudicator replied to this letter the same day, by email. He stated that he had [TRANSLATION] "no conflict of interest in the above-mentioned matter" (Applicant's Record, vol. 1, at p 191).

[25] The hearing resumed the following day, October 27, 2017, but it basically took the form of a case management conference and was held, in accordance with the Adjudicator's wishes, in camera. The Adjudicator stated that he had [TRANSLATION] "sensitive topics to discuss", namely, [TRANSLATION] "points to settle with the parties, . . . questions to ask and items to verify" (Applicant's Record, vol. 2, at pp 202, 208).

[26] The main topic of discussion was how to proceed. There seemed to be some confusion as to the point that had been reached in the proceedings (Applicant's Record, vol. 2, at pp 234–35). There did, however, seem to be a certain consensus with respect to the nature of the issues to be dealt with: the preliminary objections of the applicant, the merits of the case, which the applicant mainly associated with its preliminary objections, and the quantum of the compensation sought by the respondent (Applicant's Record, vol. 2, at pp 209–10). The applicant said that it would require three or four days to complete its evidence, both on the merits and on the quantum; the respondent said that he would require half a day for his reply evidence (Applicant's Record, vol. 2, at p 271). This did not seem to pose a problem for the Adjudicator, who even considered the idea of splitting the case and rendering an initial decision on the applicant's preliminary objections (Applicant's Record, vol. 2, at pp 274, 293).

[27] Everything fell apart, however, when the actual hearing resumed and the Adjudicator decided that it would proceed without a court reporter. The applicant, on the advice of its counsel, decided to walk out of the hearing and informed the Adjudicator that his decision not to authorize the presence of a court reporter would be challenged before the courts and that he would soon be receiving a motion for recusal (Applicant's Record, vol. 2, at p 331). The

Adjudicator, who suggested that the applicant not act on this plan, warned it that, if it did, the hearing would nevertheless proceed, as it was [TRANSLATION] "[his] hearing" (Applicant's Record, vol. 2, at pp 358, 361–62). He added that a decision would be rendered on the merits of the complaint because in such circumstances, nothing prevented him from proceeding *ex parte* (Applicant's Record, vol. 2, at pp 362–63). The Adjudicator also stated that he had no jurisdiction to dispose of a request for recusal, considering such matters to be solely within the jurisdiction of the courts (Applicant's Record, vol. 2, at pp 356–57).

[28] The hearing of October 27 is the only one for which there exists a transcript. This was prepared from a recording made by Mr. Dolbec with a handheld device. The accuracy of the transcript was not challenged by the respondent at the hearing for this judicial review.

[29] On November 16, 2017, the applicant sent the Adjudicator a written request for recusal. It alleged that the Adjudicator's conduct in the hearing gave rise to a reasonable apprehension of bias.

[30] On November 21, 2017, the Adjudicator allowed the respondent's complaint of unjust dismissal, ordered the applicant to pay the financial compensation already mentioned above and also ordered the applicant to reinstate the respondent.

[31] The Adjudicator's decision is 37 pages long. After a brief introduction, the Adjudicator sets out the evidence that was before him, as he understood it. He next deals with the three preliminary objections raised by the applicant before addressing certain decisions he had made

during the proceedings, including the decision not to issue the summons requested by the applicant and the decision not to authorize the presence of a court reporter at the hearing of October 27. He next dealt with the applicant's decision "to stop participating in [his] investigation", specifying that he had informed it of the consequences for such an act. Noting the applicant's use, throughout the adjudication proceedings, of what he considered to be stalling tactics, he stated that he was nevertheless satisfied that he had given the applicant full opportunity to present evidence and make submissions, as required by section 242 of the Code.

[32] At page 21 of the decision, the Adjudicator begins addressing the merits of the complaint, which he considers well founded, and he imposes the remedy he considers appropriate in the circumstances.

[33] Nowhere does he dispose of—or even mention—the formal request for recusal that had been addressed to him.

III. Issue and standard of review

[34] As I indicated at the outset, this judicial review is concerned only with procedural fairness and natural justice considerations. According to the applicant, the Adjudicator has committed a number of breaches in these respects. Among other things, it criticizes the Adjudicator for the following:

a. not providing it with a reasonable opportunity to reply to the evidence presented against it, especially considering that, on October 27, 2017, he had held that its evidence on the

merits of the case was complete when it had just barely begun providing it, and refused to authorize the presence of a court reporter;

b. holding, with no justification whatsoever, an in camera session at the opening of the hearing of October 27;

c. his poor management of the hearing throughout the adjudication proceedings; and

d. his refusal even to consider the request for recusal.

[35] It is well established that the issues involving the rules of procedural fairness and natural justice, including issues involving the alleged bias of an administrative decision maker, are reviewable on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Caron Transport Ltd v Williams*, 2018 FC 206 at para 24; *Conseil des Innus de Pessamit v Bellefleur*, 2017 FC 1016 at para 20, aff'd by 2018 CAF 201; *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 105 at paras 13–14, leave to appeal to SCC refused, 36440 (September 24, 2015)).

[36] I find, for the reasons that follow, that the Adjudicator's refusal to consider the request for recusal addressed to him not once but twice by the applicant, fatally vitiated his decision, which is a sufficient basis for a finding that the applicant did not, in the circumstances, benefit from a reasonable opportunity to make its case against the respondent's complaint. It will therefore not be necessary to review the other violations alleged by the applicant.

IV. Analysis

[37] It is no longer necessary to demonstrate that the adjudication proceedings initiated under Part III of the Code are flexible and efficient (*Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras 146–47, Côté and Brown JJ, in dissent but not on this point; *Delisle v Mohawk Council of Kanesatake*, 2007 FC 35 at para 23; *Dynamex Canada Inc v Mamona*, 2003 FCA 248 at para 32, leave to appeal to SCC refused, 29932 (March 4, 2004)) or that significant deference is owed to decisions reached at the end of such proceedings because of the labour relations expertise of the adjudicators appointed under these provisions of the Code (*Atomic Energy of Canada Ltd v Sheikholeslami*, [1998] 3 FC 349 (FCA), [1998] FCJ No. 250 (QL) at para 9; *Bitton v HSBC Bank Canada*, 2006 FC 1347 at para 28, 303 FTR 72; *Innu Nation of Uashat Mak Mani-Utenam v Fontaine*, 2005 FCA 357 at paras 4–5; *Colistro v BMO Bank of Montreal*, 2007 FC 540 at para 11).

[38] However, as is the case for any other administrative decision maker, unless there is a clear directive to the contrary from Parliament, the actions of an Adjudicator appointed under Part III of the Code to dispose of a complaint of unjust dismissal are subject to the rules of procedural fairness and natural justice, even though, according to the Code, the adjudicator "shall determine the procedure to be followed" (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 653; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch*), 2001 SCC 52 at para 22). I note that these rules essentially have two components: the right to be heard (the *audi*

alteram partem rule) and the right to an impartial hearing (the *nemo judex in sua causa* rule) (*Therrien (Re)*, 2001 SCC 35 at para 82).

[39] Here, Parliament took no risks, specifying at paragraph 242(2)(b) of the Code that the adjudicator "shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator", nor did it exclude the right to an impartial hearing of the parties coming before an adjudicator in the matter of unjust dismissal.

[40] The ultimate issue in this dispute is whether the Adjudicator, in handing down his decision on the merits of the respondent's complaint after ignoring or refusing to dispose of the applicant's request that he recuse himself, violated his duty to "give full opportunity to the parties to the complaint to present evidence and make submissions" to the extent that it may be held that he violated the rules of procedural fairness and natural justice in the circumstances of this case. There is, in my view, no doubt that he violated this duty.

[41] With respect, the Adjudicator's fundamental error was his belief that he lacked the necessary jurisdiction to dispose of this request. What followed was a series of adverse consequences with respect to procedural fairness, the least of which was not the fact that the Adjudicator therefore thought it appropriate to decide the respondent's complaint on the merits with the knowledge that he had not heard all of the evidence, the applicant having just begun to present its evidence. I will come back to this point, but it is not enough to say that the applicant sealed its own fate in a sense when it left the hearing room on October 27, 2017, after its request for a court reporter was denied, and that the hearing could validly continue *ex parte*, because the

applicant had a legitimate expectation, in my view, that the Adjudicator would decide, in one way or another, its request for recusal before proceeding with the hearing. Indeed, as we will also see below, it did what any diligent litigant should have done in the circumstances, which was to raise at the first possible opportunity any apprehension of bias on the part of the administrative decision maker.

[42] This Court has already held that if the issue of bias is raised in a timely fashion, that is, during the proceedings over which the administrative decision maker is presiding, the latter must decide this issue, and a failure to do so is a reviewable error (*Bongwalanga v Canada (Minister of Citizenship and Immigration)*, 2004 FC 352 at paras 15–16). This principle was reiterated as recently as this year when this Court recalled that when an administrative decision maker receives a request for recusal, he or she "[can]not simply choose to ignore it" (*Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 353 at para 63).

[43] It is true that those cases involved proceedings under the *Immigration and Refugee Protection Act*, SC 2001, c 27, but I see no reason not to apply the underlying principle to the context of adjudication proceedings brought under Part III of the Code, which are even more representative of adversarial quasi-judicial proceedings, placing two parties in opposition, than most of those before the decision-making bodies established by the *Immigration and Refugee Protection Act*, which are, in many cases, strictly inquisitorial as opposed to adversarial, and in which, generally, nobody appears to oppose the claims before those bodies (*Canada (Citizenship and Immigration) v Nwobi*, 2014 FC 520 at paras 16–17; *Ospina Velasquez v Canada (Citizenship and Immigration)*, 2013 FC 273 at para 15, 429 FTR 143).

[44] In any case, this principle, as we will see, has been applied in other contexts, including the context of arbitration tribunals established to resolve labour relations disputes. Based on a review of the case law, below is a non-exhaustive list of cases before this Court and before provincial superior courts in which this principle has been followed:

a. *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)* (1997), 144 DLR (4th) 493 (FC) at p 502, rev'd on other grounds 146 DLR (4th) 708 (FCA): alleged bias of the Chairperson of the Somalia Commission of Inquiry;

b. *Boucher v Canada (Attorney General)*, 2006 FC 1342 at para 20: alleged bias of the Chairperson of the National Parole Board;

c. *Eckervogt v British Columbia*, 2004 BCCA 398 at paras 47–48 [*Eckervogt*]: alleged bias of a part-time member of the Expropriation Compensation Board;

d. *Joyce v NL Chiropractic Board,* 2008 NLTD 144 at para 48: alleged bias of the Chairperson of a disciplinary committee of the Newfoundland and Labrador Chiropractic Board;

e. *Bajwa v British Columbia Veterinary Medical Association*, 2010 BCSC 848 at para 77, rev'd on other grounds 2011 BCCA 265, (leave to appeal to SCC refused, 34434 (February 23, 2012): alleged institutional bias of a disciplinary committee of the College of Veterinarians of British Columbia;

f. *Jogendra v Human Rights Tribunal of Ontario,* 2011 ONSC 3307 at para 41, aff'd 2012 ONCA 71, leave to appeal to SCC refused, 34775 (April 4, 2012): request for the appointment of an independent person to impartially decide a debate before the Human Rights Tribunal of Ontario.

[45] As early as 1984, the Federal Court of Appeal called "utterly fatuous" the idea that a member of an administrative tribunal—in that case the National Energy Board—against whom

an allegation of apprehension of bias had been made could not dispose of the issue him- or herself. The Court of Appeal noted that if it were otherwise, the effective operation of administrative tribunals and courts would be at the mercy of those raising such allegations, as it would be necessary in every case to suspend the proceedings before the relevant administrative tribunal pending a judicial review to decide the issue of bias. The Court of Appeal added that this would also have the effect of paralyzing each institution, thereby conflicting with the general principle that incidents arising from administrative proceedings should only be challenged in court at the conclusion of those proceedings (*Flamborough v National Energy Board, Interprovincial Pipe Line Ltd and Canada* (1984), 55 NR 95 (FCA) at p 104; see also: *Zündel v Canada (Human Rights Commission)*, [2000] 4 FC 255 (FCA) at para 10, leave to appeal to SCC refused, 28009 (December 14, 2000) [*Zündel*]; *Air Canada v Lorenz*, [2000] 1 FC 494 (FCTD) at para 15; *Ontario College of Art et al v Ontario Human Rights Commission* (1993), 11 OR (3d) 798 (Div Ct) at p 800; *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440 at para 60).

[46] It is worth noting that this general principle is meant to address two concerns, the first being that applications for judicial review presented before the administrative decision maker has issued a final decision may be rendered of no value if the complaining party is successful in the end result, and the second being that the unnecessary delays associated with such interlocutory proceedings can bring the administration of justice into disrepute and steer the administrative process into a dead end (*Zündel* at para 10).

[47] This principle of sound management of judicial and quasi-judicial resources, which, it bears noting, are not unlimited, was recently reiterated by the Federal Court of Appeal in *Exeter v Canada (Attorney General)*, 2014 FCA 251 [*Exeter*], a case involving alleged apprehension of bias against an adjudicator appointed by the Public Service Labour Relations Board established under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2, to preside over a grievance process between the applicant and her former employer, Statistics Canada.

[48] Faced with a request from the employee that a new adjudicator be appointed on the basis that the original adjudicator could not retain jurisdiction over the matter because she was biased, the Board held that even if it had jurisdiction to remove the adjudicator, it was more appropriate to let the adjudicator decide the employee's request for recusal, noting that "there was no doubt that an adjudicator has jurisdiction to decide a request for his or her recusal" (*Exeter* at para 6).

[49] The Court of Appeal decided that there was no need to interfere with that finding of the Board. It did so in the following terms, noting that this was how other decision-making forums, including courts, dealt with requests for recusal and that the employee would not suffer any prejudice in the event of an adverse decision by the adjudicator on the issue of recusal because a judicial review of the adjudicator's final decision, where the employee could raise the argument of bias again, was always open to her:

> [39] I agree with the Board that requests for recusal are more appropriately dealt with by the decision-maker seized with the matter in respect of which a reasonable apprehension of bias or conflict of interest is claimed. This is exactly how requests for recusal are dealt with in other forums, including courts: see for example, *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73, 430 N.R. 190; *Canada (Attorney General) v. Khawaja*, 2007 FC 533 (Mosley J.); *Ihasz v.*

> *Ontario*, 2013 HRTO 233, [2013] O.H.R.T.D. No. 326; *Ng v. Bank of Montreal*, [2008] C.L.A.D. No. 221.
>
> [40] In our system, one cannot presume that a decision maker cannot deal fairly with such requests simply because it is alleged that he or she is biased or has a conflict of interest. The Board's decision does not violate the applicant's constitutional rights or the Board's duty to act fairly, for the applicant was entitled, and she is currently exercising this right, to a review of the decision of the Adjudicator on a correctness standard. That standard ensures the full respect of all the applicant's rights to a fair and impartial adjudication of her recusal motion. In fact, all the applicant's concerns will be addressed by the judge who will hear her application in T-943-12.

[50] It is in that context that we must understand the obligation of any party apprehending bias on the part of an administrative decision maker before whom the party is appearing to raise the issue at first opportunity so that the decision maker can decide whether there is cause to recuse him- or herself. That obligation is firmly established in the case law, and non-compliance generally precludes the bias argument (*Zündel v Canada (Canadian Human Rights Commission*) (2000), 195 DLR (4th) 399 (FCA); *Aloulou v Canada (Citizenship and Immigration)* 2014 FC 1236 at para 32).

[51] As this Court reminded us in *Chrétien v Canada (Attorney General)*, 2005 FC 925 [*Chrétien*], what "the law requires" is not that judicial review must be commenced immediately where a party to a proceeding before an administrative decision maker has a reasonable apprehension of bias on the part of the decision maker, but that the party must raise this apprehension before the tribunal "and must not remain silent, relying on such [an apprehension] only if the outcome turns out badly" (*Chrétien* at para 44).

[52] In *Eckervogt*, a matter on which this Court relied in *Chrétien*, the British Columbia Court of Appeal provided, in my view, a good summary of the concerns underlying the obligation to raise a reasonable apprehension of bias at first opportunity and the risks associated with not doing so:

> [47] If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed. This, of course, would not apply when the ground of disqualification is discovered after the tribunal has completed the case and rendered a decision on the merits of the dispute. There is, however, a more fundamental problem with the approach taken by the appellants.
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> [48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.
>
> [Emphasis added.]

[53] Very recently, the Federal Court of Appeal echoed these principles in the clearest of terms in *Hennessey v Canada*, 2016 FCA 180 [*Hennessey*]:

> [20] . . . It is well-known that allegations of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum, here the Federal Court: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85; *In Re Human Rights Tribunal and Atomic Energy of Canada*, [1986] 1 F.C. 103 (C.A.) at page 113; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68.
>
> [21] A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance

> decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce.
>
> [Emphasis added.]

[54] Reading these excerpts from *Hennessy* leaves no doubt that these principles are now a general rule.

[55] The relatively recent decision of the appeal division of the Supreme Court of Newfoundland and Labrador in *Communication, Energy and Paperworkers Union of Canada, Local 60N v Abitibi Consolidated Company of Canada*, 2008 NLCA 4 [*Abitibi Consolidated*], which is in line with the case law of this Court and the Federal Court of Appeal on the issue, provides a useful overview of the principles in favour of immediate intervention by the administrative decision maker faced with a recusal request during a proceeding and of the corollary obligation of the party apprehending bias on the part of that decision maker to raise the issue with him or her at first opportunity.

[56] In *Abitibi Consolidated*, a three-member arbitration board was constituted under the collective agreement binding the parties to the dispute to decide on the union's grievance about a breach of said agreement. Shortly before the arbitration board began its work, the union advised the board that it would be objecting to the employer's nominee to the arbitration board on the basis of a reasonable apprehension of bias. The arbitration board upheld the union's objection, thus rejecting the employer's position that the board lacked jurisdiction to decide on the objection (*Abitibi Consolidated* at paras 2–8).

[57] The employer challenged the arbitration board's decision before a judge of the trial division of the Supreme Court of Newfoundland and Labrador. Its challenge was allowed. That decision was overturned, however, by the province's Court of Appeal. Noting a certain wavering, especially in the authorities, regarding the identity of the forum that is best suited for deciding a request for recusal at trial, the Court of Appeal was resolute in adopting the position favouring intervention by the administrative decision maker him- or herself and reiterated the considerations supporting such an intervention. It did so in the following terms:

> [35] This completes my review. The lack of consensus and the variety of opinions are, as I said at the beginning, somewhat surprising. Nevertheless, the most persuasive point of view, and the one which I adopt, is that the question of bias, when raised, should be dealt with by the person against whom the allegation is made. The theoretical problems noted by the applications judge in para. 33 of his Reasons (para. 9 above) are outweighed, in my opinion, particularly in the case of consensual labour arbitration boards, by the practical considerations of efficiency and speedy resolution of employee/employer grievances. The prompt resolution of grievances in the work place is what the arbitration procedure is designed to effect. Grievances which are allowed to fester do nothing for labour peace and good working conditions. Obliged recourse to the court as soon as an allegation of bias is raised would have the effect of causing long and unnecessary delays.
>
> [36] There are also the advantages, as noted by Slatter J. in *Robertson*, of respect for the tribunal and the prevention of unnecessary interference by the court, cost savings and the tempering effect of having to confront the board member with an allegation of bias, thereby also placing on the record the facts relevant to the bias application. Most allegations of bias or reasonable apprehension of bias will resolve themselves either by the party alleging bias being satisfied with the explanation given, or by the person challenged recusing himself or herself. If, however, the person challenged decides there is no good reason for recusal and the party alleging bias is not satisfied, the bias issue can be dealt with by the court by way of judicial review after the arbitration has been heard and a decision filed, together with, if relevant, a judicial review of the decision on its merits. Proceeding in this way fosters timeliness in the resolution of grievances while ensuring that the allegation of bias or reasonable apprehension of

> bias can, if necessary, be dealt with ultimately by an impartial judiciary.
>
> [37] There may be reasons, statutory or otherwise, why allegations of bias before administrative tribunals, other than consensual labour arbitration boards, should be referred immediately to the court. I would not foreclose any such argument. Nonetheless, it seems to me that in the majority of cases the procedure described above should be followed, i.e., the allegation be dealt with immediately by the person challenged and only later by the court.
>
> [Emphasis added.]

[58] In this case, neither the Adjudicator nor the respondent have put forward considerations that would support the Court's immediate intervention when an allegation of bias is raised by a party to an adjudication initiated under Part III of the Code. In any event, I do not see any.

[59] In sum, it was for the applicant to raise its concerns with the Adjudicator regarding what it perceived as a lack of impartiality on his part, which it did at first opportunity. Indeed, it could not have not done so since it would have been precluded from raising it later in a potential judicial review of the Adjudicator's decision. In turn, it was for the Adjudicator to respond to the applicant's concerns, one way or another, and he could not do so by claiming a lack of jurisdiction on this issue. As we have just seen, that reaction had no legal foundation, at least based on the case law of this Court and of the Federal Court of Appeal.

[60] That error then had significant adverse consequences for the respect of the applicant's right to present all of its evidence and submissions because the Adjudicator believed that it was legitimate for him to proceed *ex parte* by rendering a decision on the merits of the respondent's complaint without having before him all of the applicant's evidence and submissions. Moreover,

he did so knowingly, if the transcript of the hearing dated October 27, 2017, is to be believed. This legitimization was flawed from the start and could not justify everything that followed in the proceeding.

[61] What would have been legitimate, however, in light of the state of the law, would have been for the applicant to receive from the Adjudicator, before he proceeded, a response with reasons (*Saint-Eustache v Canada (Citizenship and Immigration)*, 2012 FC 511, at para 28; *Boucher v Canada (Attorney General)*, 2006 FC 1342, at para 20) to its request for recusal (which I cannot characterize as being frivolous or vexatious without determining its merits). Instead of receiving such a response, it received the Adjudicator's final decision on the complaint itself, which ordered it, on the basis of incomplete evidence, to pay substantial amounts of money and to reinstate the respondent.

[62] In my view, it is also in that context that we have to understand the applicant's decision to leave the hearing room on October 27. It was not renouncing its right to defend itself; it wanted to remove what it considered to be a stain blighting the impartiality of the adjudication process in which it was involved, impartiality that, furthermore, it had every right to expect (*Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3 at para 80). As the Supreme Court of Canada reiterated in that decision, at paragraph 80, "[w]here a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension". The request for recusal was clearly stated at the hearing and was formally submitted to the Adjudicator in writing within a reasonable time period, all things considered, given that the transcript of the recording of the hearing was not immediately available. As we

have seen, that request was completely ignored, even in the Adjudicator's final decision where it was not mentioned at all.

[63] It is for those reasons that the Adjudicator's observations in the decision he rendered on the applicant's decision "to stop participating in [his] investigation" and on the *audi alteram partem* rule, which he used as justifications to finish disposing of the file following the hearing of October 27 baffle me. In addition, the Adjudicator's statement that the employer was properly informed about the Adjudicator's intention to continue his investigation *ex parte* when the employer "confirm[ed] that it was leaving not to return to our future hearings whether such hearings were scheduled or not" (Applicant's Record, vol. 1, at p 39, at para 94) completely disregards, as does the rest of the Adjudicator's decision, the request for recusal and suggests that the applicant had completely disengaged from the proceeding, even though that is not what the evidence on the record shows. As I have already indicated, the applicant withdrew from the October 27 hearing only until the Adjudicator decided on the request for recusal it was going to submit to him, which, I repeat, the Adjudicator never did.

[64] The same comment applies to the rather harsh criticism made by the Adjudicator regarding the "choice by the Employer to slam the door on our hearing". According to the Adjudicator, that choice "does not respect the principles of a country like Canada, that is exemplary throughout the world as far as justice in general is concerned and especially close administrative justice like the adjudication of labour complaints", and cripples the "Canadian system of adjudication", which "cannot stop functioning simply because one party, for personal reasons, refuses to participate in it" (Applicant's Record, vol. 1, at p 41, at para 105).

[65] There again, if the applicant's request for recusal is ignored, some might say that those remarks are inspiring. However, when we take it into account, as we should, they fall flat. Indeed, in the context of this matter, the temptation is to say that a country like Canada, which serves as a model for justice in general and especially local administrative justice, recognizes the general principle that an administrative decision maker does not have the leisure to not consider a request for recusal when one is submitted to him or her, failing which he or she is committing a reviewable error.

[66] Therefore, by bluntly, and without any legal basis, claiming that he lacked jurisdiction to recuse himself; by thus ignoring the request for recusal that the applicant had formally submitted to him as it was obliged to do; by erroneously treating the applicant's decision not to participate in the hearings until he decided on said request as a permanent withdrawal from the adjudication proceedings; by ending the hearings at that time (Applicant's Record, vol. 1, at p 42, at para 109); and by rendering his decision in that context, when he knew that the evidence was incomplete, the Adjudicator violated the applicant's right to fully respond to the complaint lodged against it so as to warrant the Court's intervention. I reiterate here that, when a decision affects compliance with the rules of procedural fairness and natural justice, the administrative decision maker is owed no deference.

[67] The respondent did not really approach the case from that angle, only arguing that the applicant's apprehension of bias was unfounded and that the Adjudicator had provided in his decision rational reasons with respect to his refusal to issue summonses and to allow the presence of a court reporter. But that is not where the problem lies. Even if the respondent turns

out to be right—a matter I am not deciding—the fact remains that, in refusing to dispose of the request for recusal when he should have done so and in deciding on the merits of the complaint before even hearing all of the evidence, the Adjudicator short-circuited the process to the detriment of the applicant, which, I reiterate, had a legitimate expectation that the Adjudicator would decide its request for recusal before proceeding.

[68] I will therefore set aside the Adjudicator's decision, but I will not refer it back to him, which, in theory, could have saved the parties time and money in a file that has been pending for eight years now. I will not do so because of the comments found in the Adjudicator's decision about the applicant's behaviour outside the adjudication process, comments I find to be unjustified. First, I do not see on what basis the Adjudicator could, in barely veiled references, blame the applicant for all of the delays that have occurred since the respondent filed his complaint. After all, the applicant cannot be blamed for the delay caused by Adjudicator Tremblay's death or the delays related to the dispute before the CSST regarding its constitutional jurisdiction to hear the complaint lodged by the respondent under section 32 of the ARIAOD, which was ultimately resolved in the applicant's favour.

[69] Second, I cannot agree with the Adjudicator's point of view that, for all intents and purposes, the applicant used stalling tactics to unduly delay the progress of this file. It is true that the applicant could have arrived on the first day of hearings better prepared than it was. However, from Mr. Dolbec's first appearance on what was really the second day of hearings, Mr. Dolbec seems to have done everything that a conscientious lawyer would do to defend the interests of his or her client. After all, the applicant was facing a substantial claim and fully had

the right to defend itself. The flexible and expedient nature of the adjudication process established by Part III of the Code cannot dilute this right.

[70] Finally, the applicant's decision to withdraw from the hearing process while it submitted its request for recusal in a more formal and organized manner and the Adjudicator disposed of this request, did not, in my view, constitute a stalling tactic in the rather particular circumstances of this case. As I have mentioned several times, the applicant had to raise its concerns regarding the apprehension of bias on the part of the Adjudicator at first opportunity and had to do so before him or face an argument of preclusion, and it had the right to expect the Adjudicator to decide on the issue.

[71] Although I am aware of the delays incurred since the filing of the respondent's complaint, it is preferable in these circumstances that this complaint be referred back for reconsideration by a differently constituted adjudication panel.

[72] The applicant is seeking costs. Clearly, the result of the proceeding is a factor that the Court may take into account in awarding costs, and it would obviously militate in favour of awarding costs to the applicant. However, under Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, awarding costs remains a discretionary matter. In this case, the respondent has nothing to do with the outcome, which requires the initiation of a new adjudication procedure. I will not penalize him twice by ordering him to pay costs.

JUDGMENT in Docket T-333-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision of the Adjudicator, Jean-Claude Bernatchez, dated November 21, 2017, allowing the unjust dismissal complaint filed by the respondent against the applicant is set aside, and the matter is remitted to a new adjudicator, to be appointed by the federal Minister of Labour under Part III of the *Canada Labour Code*, for redetermination;

3. Without costs.

"René LeBlanc"
Judge

Certified true translation
This 4th day of December, 2018.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-333-18
STYLE OF CAUSE:	TRANSPORT CAR-FRÉ LTÉE v DAVID LECOURS
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	OCTOBER 10, 2018
JUDGMENT AND REASONS:	LEBLANC J.
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APPEARANCES:

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