Federal Court Cour fédérale

Date: 20201202

Docket: T-162-20

Citation: 2020 FC 1108

Ottawa, Ontario, December 2, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

GARDAWORLD CASH SERVICES CANADA CORPORATION

Applicant

and

DEAN A. SMITH

Respondent

JUDGMENT AND REASONS

[1] GardaWorld Cash Services Canada Corporation [Garda] terminated Mr. Smith, one of its employees who headed its branch in Red Deer, Alberta. Mr. Smith initiated a complaint for unjust dismissal under the *Canada Labour Code*, RSC 1985, c L-2 [the Code]. After protracted proceedings, which included the issuance and retraction of a first decision, the adjudicator found that Mr. Smith's dismissal was unjust, ordered Garda to pay approximately $60,000 in damages, as well as $500,000 in punitive damages.

[2] Garda now applies for judicial review of the adjudicator's decision. It argues that the decision is unreasonable on the merits and that the adjudicator breached procedural fairness and showed a reasonable apprehension of bias. I agree that the adjudicator's private communications with Mr. Smith, conduct towards Garda's counsel and comments about witnesses give rise to a reasonable apprehension of bias. Thus, the adjudicator's decision must be quashed. However, I decline Garda's invitation to rule on the merits of the complaint myself. The matter must be sent back to a different adjudicator for redetermination.

[3] Although the parties filed a considerable volume of evidence and made wide-ranging submissions, I will confine myself to the issue of bias, which is sufficient to dispose of the case, and I will say as little as possible about the merits. These reasons are organized as follows. I first give an account of the incident that led to Mr. Smith's termination. I describe the main steps of the proceedings before the adjudicator. I then show why several aspects of the adjudicator's conduct gave rise to a reasonable apprehension of bias.

I. Factual Background

[4] On July 10, 2017, Mr. Smith attended the Sobeys liquor store in Sylvan Lake. He wore his uniform and was ostensibly on duty. He explained to the store's manager that he thought he had lost a piece of identification while shopping at the store a few days earlier and asked for an opportunity to look at the recordings of the store's CCTV camera system. Even though the manager had not found any lost ID, she agreed to Mr. Smith's request.

[5] Mr. Smith found images of himself waiting in line to pay at the cash. He asked for permission to take pictures of these images on his smartphone, to be able to enlarge them later. He is not alone on the pictures he took. Another woman appears in front of him at the cash. This woman is a social worker with the Alberta Ministry of Children's Services. One of the cases assigned to her relates to the son of Ms. Opal Roszell, who is Mr. Smith's tenant and, according to Garda, his girlfriend. Mr. Smith admits that he knows who the social worker is and that he recognized her on that occasion.

[6] On July 14, 2017, Ms. Roszell transmitted a complaint to Alberta's Children's Services Minister, alleging that the social worker had an alcohol consumption problem. The complaint contained information about the social worker apparently retrieved from the Internet, including personal information and various pictures appearing on social media showing the social worker partying with friends. It also included two pictures taken by Mr. Smith from the Sobeys CCTV footage, showing the social worker buying alcohol. Mr. Smith himself can be seen on one of the pictures.

[7] The social worker called the RCMP, as she was concerned for her own safety. She identified the man standing besides her on one of the pictures as Ms. Rozsell's boyfriend. After speaking with Sobeys's store manager, the RCMP officer who investigated the matter concluded that no criminal offence was committed, but found it appropriate to disclose the situation to Garda and Sobeys. On July 20, 2017, Sobeys wrote to Garda to complain about the incident and to request that Mr. Smith not be dispatched to Sobeys stores.

[8] On July 21, 2017, Garda executives interviewed Mr. Smith regarding the Sobeys incident. Their notes show that Mr. Smith explained that he was simply seeking to find his lost piece of identification and that he sent the pictures to his girlfriend, who had a phone with a wider screen, to be able to enlarge the pictures. Mr. Smith was immediately suspended from road duties. Mr. Smith was interviewed again by Garda's corporate security investigator on July 25. He was terminated on August 14.

[9] Some aspects of these events are in dispute or have been the subject of contradictory evidence before the adjudicator. Mr. Smith now asserts that a number of statements attributed to him in Garda's notes of the interviews are false. Notably, he denies sending the pictures to Ms. Roszell, who testified that she may have had access to them because her tablet was synchronized with Mr. Smith's smartphone. Ms. Roszell initially denied sending the complaint to the Ministry of Children's Services, but later recanted her testimony and admitted doing so. Mr. Smith and Ms. Roszell deny that they are in a romantic relationship; rather, Ms. Roszell would simply be renting a room in Mr. Smith's house.

II. Proceedings Before the Adjudicator

[10] Mr. Smith made a complaint for unjust dismissal and requested the appointment of an adjudicator pursuant to the Code. After significant delays, a hearing took place on April 3 and 4, 2019. At that hearing, Garda called as witnesses its two executives who interviewed Mr. Smith before his termination. Mr. Smith, who was not represented by a lawyer, called three current or former Garda employees and testified himself. Garda argued that Mr. Smith was a "manager" who cannot bring a complaint for unjust dismissal, given subsection 167(3) of the Code, and that,

in any event, his termination was justified, mainly because of the Sobeys incident and his refusal to be forthcoming about what really took place.

[11] At the close of the April hearing, the adjudicator left open the possibility of reconvening a further hearing. After the hearing, both parties communicated by email with the adjudicator, without immediately copying each other. For example, Mr. Smith sent written submissions on April 20, and Garda on June 3. In both cases, the adjudicator forwarded the email to the other party.

[12] From June 21 to July 16, however, the adjudicator engaged in a series of email exchanges with Mr. Smith, unbeknownst to Garda. In these exchanges, the adjudicator solicited information from Mr. Smith regarding two main subjects: his status as a manager and his claim for damages. Mr. Smith took the opportunity of these exchanges to reiterate allegations of bad faith against Garda and to inform the adjudicator that a number of Garda employees, including one who testified at the hearing, had been terminated. These exchanges are analyzed in more detail below.

[13] Moreover, on June 26, after reaching the conclusion that Mr. Smith had been unjustly dismissed, the adjudicator sought the help of the firm Economica Ltd. to calculate damages. He mentioned this to Mr. Smith, but not to Garda.

[14] On July 18, 2019, the adjudicator issued a 45-page decision that fully sided with Mr. Smith. The adjudicator’s reasons are poorly structured and difficult to follow. He reached the conclusion that Mr. Smith was not a manager and was terminated without cause. He found that

Garda acted in "bad faith" and treated Mr. Smith in a "premeditated, careless and callous manner." While this conclusion is not explicitly justified, the recurring theme throughout the decision is that Garda invented crucial aspects of the Sobeys incident to be able to terminate Mr. Smith without providing notice, as part of a campaign to reduce Garda's operating costs. Thus, the adjudicator suggests, at several places in his reasons, that Garda's witnesses were not credible and that "an inference may be drawn that Garda was looking for additional reasons for dismissal" (p 27; see also pp 8, 11). He went as far as suggesting that the RCMP officer acted improperly at the behest of Garda's management (p 27) and doubting that Ms. Roszell ever sent a complaint about the social to the Ministry of Children's Services (p 9).

[15] As Economica Ltd. had not yet provided its calculation of the damages, the adjudicator retained jurisdiction. Nevertheless, he ordered the immediate payment of a sum of $13,779, to compensate Mr. Smith for various expenses incurred after his termination, as well as a sum of $2,000 intended to pay for the publication of a notice of the award.

[16] On July 31, 2019, Garda wrote to the adjudicator to express its concerns with the July 18 decision. It asserted that the decision was based on a number of erroneous findings of fact. It appended a "can say" statement from the RCMP officer who investigated the Sobeys incident, as well as pictures taken from the Internet that could suggest that Mr. Smith and Ms. Roszell were involved in a romantic relationship. Moreover, Garda noted that several findings were based on emails from Mr. Smith that were never provided to Garda. It also argued that the award of costs was unsupportable at law. For all these reasons, Garda asked the adjudicator to retract his July 18 decision.

[17] On August 1, the adjudicator agreed to retract his decision, forward a copy of his email exchanges with Mr. Smith to Garda's counsel and reconvene a hearing. Over the following days, he forwarded most, but not all, communications he had with Mr. Smith in June and July.

[18] On August 16, the adjudicator sent three long emails to Garda's counsel, disputing most of the claims made in the July 31 letter. Lengthy exchanges followed, mainly between the adjudicator and Garda's counsel, as to the scheduling of this new hearing. Garda initially sought to have 20 witnesses testify at that new hearing. The adjudicator strongly reacted to what he considered an abusive stance. This led to heated exchanges that are further analyzed below.

[19] The second hearing took place on November 7. Mr. Smith testified and was cross-examined, but left immediately afterwards given his work schedule. Garda called four witnesses: two of its executives, the RCMP officer and a representative from the Ministry of Children's Services. The adjudicator also received sworn statements from Mr. Smith and Ms. Roszell.

[20] The adjudicator, the parties and Ms. Roszell kept communicating with each other by email over the following weeks. Garda's counsel objected to the fact that these emails constituted unsworn evidence. As a result, the adjudicator asked Mr. Smith, Ms. Roszell and another witness to provide further sworn statements.

[21] The adjudicator issued his decision on January 29, 2020. The decision is 61 pages long and once again, it is poorly organized and difficult to follow. Although the adjudicator mentions the evidence given at the second hearing, his main findings are substantially the same as in his

first decision. In reviewing the evidence, the adjudicator criticizes everything that does not conform to Mr. Smith's version of events. While he acknowledges that Ms. Roszell admitted sending the complaint to the Ministry of Children's Services after denying doing so, he apparently believes her explanation that she gained access to the pictures taken by Mr. Smith at Sobeys through a common iCloud account. The following two paragraphs (at p 39) appear to summarize his views:

> Reflecting on the evidence and various testimonies, the Adjudicator is of the opinion that, on a balance of probabilities, the examination of the Sobeys CCTV by the Complainant was not an unauthorized extraordinary event (that occurred on this single instance) warranting termination of his employment for cause. Such examination was probably only regarded as serious because Sobeys expressed concern. It is hard to understand how the rather incomplete can say information provided by the RCMP officer happened to coincide with [Garda's general manager's] misleading and distorted interpretation of the circumstances. While difficult to understand, the Adjudicator feels the officer's uninvestigated can say suggestion of July 19, 2019 as quoted before: "I concluded that the most probable version of events is that Dean Smith fabricated that he wanted pictures of his lost ID in order to obtain pictures of [the social worker] purchasing liquor..." must have contributed to or fitted in with the misleading circumstances portrayed by Garda.
>
> Consequently, the Adjudicator is of the view, on a balance of probabilities, based on the evidence and in the context of a campaign to reduce head count, it was expedient for Garda to terminate the employment of the Complainant, Smith, even for cause.

[22] The adjudicator condemned Garda to pay Mr. Smith damages in the amount calculated by Economica Ltd, that is, $62,278. In addition, he condemned Garda to pay $500,000 in punitive damages.

[23] Garda is now seeking judicial review of this decision.

III. Analysis

[24] Garda challenges the adjudicator's second decision on three main grounds: it is unreasonable on the merits, the adjudicator breached procedural fairness and his conduct raises a reasonable apprehension of bias. These grounds are intertwined to a certain extent, as Garda's allegations regarding apprehension of bias rely on its criticism of the decision and on events that would also be procedurally unfair.

[25] I conclude that the adjudicator's conduct raises a reasonable apprehension of bias. I reach this conclusion without reviewing the substance of the adjudicator's decision. Likewise, I do not need to review allegations of procedural unfairness beyond those related to bias. The matter will be remitted to a different adjudicator for a new decision. As I do not pronounce on the substance of the dispute, the new adjudicator will be free to take a fresh look at the matter, unconstrained by previous pronouncements.

A. *Reasonable Apprehension of Bias*

[26] Disagreement among members of our society is inevitable. Yet, to achieve social peace and a sense of justice, we must at least be able to agree on a process to settle legal disputes. This is the role of courts and administrative decision-makers. But for people to agree to submit their disputes to the courts and respect their decisions, they must consider that courts are impartial, not biased. No one would have confidence in the administration of justice if judges were biased.

[27] Thus, impartiality inheres in the adjudicative role. As the symbol of a blindfolded woman holding the scales of justice suggests, judges and other decision-makers must not favour one party at the expense of the other. They must approach cases with an open mind and be ready to be convinced by each party's evidence and arguments. They must not have an interest in the case or prejudice towards one party. Indeed, the public "expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them:" *R v S (RD)*, [1997] 3 SCR 484 at paragraph 40.

[28] The adjudicator in this case did not meet this standard. Several aspects of his conduct give rise to a reasonable apprehension of bias. The *ex parte* communications show that he took up the role of an advocate for Mr. Smith. He showed antipathy towards Garda's counsel. He made remarks that were systematically favourable to Mr. Smith's witnesses and unfavourable to Garda's. The sequence of events leading to the award of punitive damages leads a reasonable observer to conclude that this award was made in retaliation for Garda's challenge to his first decision.

[29] To explain why I reach these conclusions, I first lay out the general principles guiding the analysis of allegations of reasonable apprehension of bias. I then examine each aspect of the adjudicator's conduct that contributes to creating such an apprehension.

(1) Legal Principles

[30] The impartiality of judges and administrative decision-makers is guaranteed by several constitutional and statutory sources, as well as the common law. I need not examine the written

sources here, as this case may be settled by the rules of the common law. Case law has established general principles to ascertain whether a judge is impartial. After setting out these principles, I address how their application must take into account two specific aspects of this case, namely, that the adjudicator is not a judge but an administrative decision-maker and that Mr. Smith is self-represented.

[31] As mentioned above, impartiality is pivotal to ensure that parties accept the judicial process and its outcome. To achieve this, however, the process must not only be fair but also perceived to be fair, if not by the parties themselves, at least by reasonable observers who take a close look at the situation. Thus, we approach allegations of bias not by inquiring into the judge's actual state of mind, but by asking whether the circumstances give rise to a reasonable apprehension of bias. According to a long line of cases, allegations of bias must be assessed from the perspective of a reasonable observer who takes all the facts into careful consideration: *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394.

[32] There is a high threshold for proving a reasonable apprehension of bias, as judges are presumed to be impartial: *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at paragraphs 14-22, [2013] 2 SCR 357; *Yukon Francophone School Board*, at paragraph 25; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at paragraph 57 [*Oleynik*]. Indeed, respect for the administration of justice would be undermined if litigants made allegations of bias in a careless fashion or if judges were disqualified without solid grounds.

[33] Like judges, administrative decision-makers must be impartial. Administrative decision-makers, however, exercise a broad range of functions, ranging from adjudication of disputes to broad policy-making decisions. Thus, the requirement of impartiality must be calibrated by reviewing the nature and characteristics of the decision-maker, as well as the relevant statutory regime: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 47 [*Baker*]. The Supreme Court of Canada provided the following explanation in *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at paragraph 21, [2003] 1 SCR 884:

> … administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" […]. Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.

[34] Adjudicators under the Code are close to the judicial end of this spectrum. Our Court requires them to be impartial and relies on the principles regarding the impartiality of judges to assess whether there is a reasonable apprehension of bias: *Bank of Montreal v Brown*, 2006 FC 503; *Bank of Montreal v Payne*, 2012 FC 431 at paragraphs 51-52, reversed on other grounds, 2013 FCA 33; *Rafizadeh v Toronto Dominion Bank*, 2013 FC 781, at paragraphs 15 and 16.

[35] Nevertheless, procedure before administrative decision-makers is flexible and is not required to mirror the judicial process. One of the reasons for entrusting large areas of the law to

administrative decision-makers is to allow for a process that is simpler, more flexible and more accessible than that of the courts. Thus, a reviewing court should not find bias simply because a decision-maker adopts a process that differs, in some respects, from that followed by courts. In particular, adjudicators under the Code do not show bias simply by acting differently than courts in some respects, for example by engaging in mediation: *Skinner v Fedex Ground Ltd,* 2014 FC 426.

[36] The fact that Mr. Smith is self-represented is also relevant to the bias issue. Self-represented litigants face significant disadvantages when they bring their cases to court. They are often unfamiliar with the judicial process and the substantive law. Judges and administrative decision-makers increasingly recognize that they should provide information and assistance to self-represented litigants, to help them understand the process. There is also a growing acceptance of the need to transform the judicial or administrative process to make it more accessible for self-represented litigants, for example through what is known as “active adjudication.” These practices do not give rise, in and of themselves, to a reasonable apprehension of bias: Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006, endorsed by the Supreme Court of Canada in *Pintea v Jonhs*, 2017 SCC 23, at paragraph 4, [2017] 1 SCR 470; see also Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law” (2015) 38 Dalhousie LJ 119; Jula Hughes and Philip Bryden, “Implications of Case Management and Active Adjudication for Judicial Disqualification” (2017) 54 Alberta L Rev 849. Yet, the requirement of impartiality remains and the judge or decision-maker “must carefully walk the line between being of assistance to [self-represented] litigants and becoming

their advocate:" *Malton v Attia*, 2016 ABCA 130, at paragraph 3. A detailed review of the facts of this case shows that the adjudicator crossed that line.

[37] Various kinds of situations may give rise to a reasonable apprehension of bias: for a survey, see Philip Bryden, "Legal Principles Governing the Disqualification of Judges" (2003) 82 Can Bar Rev 555. In this case, the allegations of bias are based on the adjudicator's statements or conduct during the course of the proceedings. The case law provides examples of conduct that gives rise to a reasonable apprehension of bias, including the decision-maker's public statements regarding the outcome of the case (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 [*Newfoundland Telephone*]), private communications with one party or its counsel (*Hunt v The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 [*Hunt*]; *Setlur (Attorney General) v Canada*, 2000 CanLII 16580 (FCA) [*Setlur*]) and persistent hostility towards counsel (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paragraph 25, [2015] 2 SCR 282 [*Yukon Francophone School Board*]) or a witness (*Brouillard Also Known As Chatel v The Queen*, [1985] 1 SCR 39). In certain circumstances, a reasonable apprehension of bias may result from comments made in the reasons for decision: *Baker*, at paragraph 48; *Sawridge Band v Canada*, [1997] 3 FC 580 (CA) [*Sawridge Band*].

[38] In particular, a judge should not communicate with one party about the case in the absence of the other party or, at the very least, without giving notice to the other party as soon as feasible: *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at paragraphs 74-75 [*Tobiass*]. This situation, known as an "*ex parte* communication," may give

rise to procedural unfairness, as the other party is deprived of the opportunity to respond: *Kane v University of British Columbia*, [1980] 1 SCR 1105 at 1114-1115; *National Bank of Canada v Lajoie*, 2007 FC 1130 at paragraphs 16-20. Quite understandably, the party excluded from the conversation may also have serious concerns about the judge's impartiality, thus giving rise to a reasonable apprehension of bias: see, for example, *Tobiass*; *Setlur*; *Ciebien v Canada (Attorney General),* 2005 FC 167 at paragraphs 59-61.

[39] The rationale for this prohibition also applies to administrative decision-makers. Nevertheless, some flexibility is in order, especially where the decision-maker is not assisted by a registry through which communication with the parties may be channelled. In these circumstances, communications pertaining to purely administrative or scheduling matters do not give rise to procedural unfairness or an apprehension of bias: *Grey v Whitefish Lake First Nation*, 2020 FC 949 at paragraphs 44-51. Likewise, where a party, especially a self-represented one, sends information to the decision-maker without providing a copy to the other party, no harm is done if the decision-maker immediately forwards the communication to the other party: *GRK Fasteners v Leland Industries Inc*, 2006 FCA 118 at paragraph 17; see also *Opaskwayak Cree Nation v Booth*, 2009 FC 225 at paragraphs 55-59, aff'd 2010 FCA 299.

(2) *Ex parte* communications with Mr. Smith

[40] The first problematic aspect of the adjudicator's conduct is his *ex parte* communications with Mr. Smith. These communications did not pertain to purely administrative matters and did not simply deprive Garda of the opportunity to respond. Rather, they show that the adjudicator had made up his mind on several crucial issues without the necessary evidence and was seeking

additional facts from Mr. Smith to buttress his conclusions. They also show, more generally, that the adjudicator was prepared to give advice to Mr. Smith (and to his witness Ms. Roszell) to help him present his case. He also shared his preliminary findings with Mr. Smith, but not with Garda's counsel. Thus, one could reasonably conclude that the adjudicator viewed his role as that of an advocate for Mr. Smith rather than a neutral decision-maker. As a result, the adjudicator's conduct gives rise to a reasonable apprehension of bias.

[41] A first *ex parte* communication took place on June 7, 2019. On that date, Mr. Smith sent an email to the adjudicator about the termination of certain Garda employees. The adjudicator forwarded the email to Garda's counsel. This, however, was not the end of the conversation. The next day, Mr. Smith emailed again (Applicant's Record [AR] at 550), making the point that the termination of one of these employees (Mr. Dan Smith, not to be confused with the respondent Mr. Smith), who had testified for Garda at the hearing, tended to show that the Sobeys incident was merely a pretense for terminating his own employment for cost reduction purposes. He wrote:

> And the termination of Dan Micheal Smith is suspicious to say the least. […] Dan was cost cutting and lied! […] He lied, in attempt to come up with a reason not to pay me severance to cut cost. Rumor has it they are letting go of all senior staff for overhead reasons for the purpose of sale.

[42] The adjudicator's initial reaction to this email, conveyed the same day, was to tell Mr. Smith to "focus on your own complaint only and not pursue the firings mentioned by you" (AR at 553). Nevertheless, the adjudicator became increasingly interested in the idea that the true motive for Mr. Smith's termination was the reduction of Garda's operating costs.

[43] The most important series of *ex parte* communications begins on June 20, 2019. On that date, without giving notice to Garda's counsel, the adjudicator sent Mr. Smith a long list of questions pertaining to the "manager issue," to the use of Garda vehicles and fuel cards and to the damages Mr. Smith was seeking. Mr. Smith responded the next day (AR at 557-563). The adjudicator replied the same day with further questions on the same subjects as well as the Sobeys incident. On June 24, the adjudicator asked another round of questions and suggested to Mr. Smith that he claim his expenses associated with the hearing. The adjudicator noted:

> I can see that my queries are somewhat endless and are going around in circles. I am trying to understand the extent of control Garda Calgary may have had over your working day. (AR at 573)

[44] On June 25, the adjudicator emailed Mr. Smith, telling him that he had reached the conclusion that Garda had no just cause for his termination and that the remaining issue was what reasonable notice had to be paid. He asked him to prepare calculations based on 3, 6 and 12 months of notice (AR at 579-580). Mr. Smith responded later the same day with a schedule of various heads of damages totalling a little more than $1 million (AR at 585-588). On June 26, the adjudicator responded with some comments and mentioned that he intended to hire an accountant (AR at 594). Mr. Smith and the adjudicator exchanged several emails on that day.

[45] On July 4, the adjudicator wrote again to Mr. Smith to ask another series of questions about the Sobeys incident and his termination, as well as the "manager issue" (AR at 622-627). Mr. Smith answered the same day, and provided additional answers and a statement of expenses the next day and the day after (AR at 628-637). On July 5, the adjudicator also asked additional questions about the "manager issue," the Sobeys incident and his termination. The adjudicator

wrote again to Mr. Smith on July 11 and 12, asking questions pertaining mostly to his termination, Garda's motives and damages (AR at 645-649).

[46] On July 16, two days before issuing his first decision, the adjudicator sent a long list of questions to Mr. Smith, essentially asking him to confirm a number of findings of fact he intended to make regarding the Sobeys incident and his termination (AR 653-662).

[47] Thus, one can appreciate that during the first half of the month of July, the adjudicator kept looking for additional evidence and clarification on the "manager issue" and Mr. Smith's termination, even though he had already told him on June 25 that he had concluded that he had been dismissed without cause. Yet, the adjudicator could only reach this conclusion after finding that Mr. Smith was not a manager and after considering all the evidence regarding his termination.

[48] To give rise to a reasonable apprehension of bias, it is not necessary to show the impact of the evidence conveyed through the *ex parte* communications. In any event, the first decision's poor structure makes it difficult to follow the adjudicator's reasoning and to isolate the impact of specific pieces of evidence. Nevertheless, the reasons for decision refer extensively to information provided by Mr. Smith. For example, at pages 5 and 6 of the first decision, the adjudicator quotes verbatim an answer provided by Mr. Smith on July 4 and gives a detailed summary of the July 16 email; at pages 18-24, he summarizes other answers given by Mr. Smith in late June and early July; at pages 39-41, he quotes verbatim Mr. Smith's July 12 email regarding his financial circumstances and attempts to find new employment.

[49] Most importantly, the adjudicator did not seek Garda's comments on the evidence he obtained from Mr. Smith. To a reasonable observer, this can only mean that the adjudicator had made up his mind in favour of Mr. Smith, sought additional evidence buttressing his conclusion and was uninterested in hearing anything that would contradict it. In other words, the adjudicator ceased acting in an impartial manner and instead became an advocate for Mr. Smith. These communications are sufficient to create a reasonable apprehension of bias. By their duration and scope, they far exceed those that led to the disqualification of the decision-maker in cases such as *Setlur* or *Hunt*. No reasonable observer would accept to submit their disputes to such a process. I would simply add that the flexibility of administrative proceedings and the willingness to help self-represented litigants do not excuse the adjudicator's conduct. Even in an adapted form, justice must still be done in public and with both parties present.

[50] Nevertheless, Mr. Smith argues that the adjudicator also engaged in *ex parte* communications with Garda's counsel, thus showing that he was not biased. To be sure, such communications took place on a few occasions. In particular, on June 7, the arbitrator asked a number of factual questions to Garda's counsel. On July 5, she provided a response to the adjudicator alone (AR at 483), who never forwarded it to Mr. Smith. However, a review of these communications shows that the adjudicator did not embark on a systematic search for evidence favourable to Garda or anything that might evince bias against Mr. Smith. As in *Setlur*, the fact that the decision-maker initiated separate conversations with each party does not negate the apprehension of bias resulting from the comments made to one party during one of these conversations. Later in these reasons, I will address Mr. Smith's argument that by writing to the

adjudicator alone, Garda acquiesced to whatever communications the adjudicator had with Mr. Smith.

[51] Mr. Smith also suggests that the adjudicator acted in good faith. He knew that it was preferable not to have *ex parte* communications, as he initially urged Mr. Smith to copy Garda's counsel on any correspondence sent to him (AR at 553). Forgetting to abide by this rule himself would be nothing more than an honest mistake. His mention of Mr. Smith's emails in his first decision would show that he thought he was not doing anything wrong. However, a reasonable apprehension of bias does not depend on proof of the decision-maker's actual state of mind. The assessment is objective. Any reasonable observer would conclude that the adjudicator seriously misunderstood his role. Moreover, the remarks he made in his second decision, which are quoted below, belie any suggestion that the adjudicator acted by mistake in engaging in *ex parte* communications with Mr. Smith.

(3) Hostility Towards Garda's Counsel

[52] The adjudicator's hostility towards Garda's counsel also contributes to create a reasonable apprehension of bias. This hostility manifested itself mainly in the course of email exchanges taking place in August and early September 2019, after Garda's counsel wrote a long letter criticizing the adjudicator's first decision and the process that led to it. In these communications, the adjudicator and Garda's counsel explored various manners of convening a second hearing or gathering new evidence. For our purposes, what matters is not the procedural decisions the adjudicator made, but the adversarial tone he adopted towards Garda's counsel.

[53] On August 16, the adjudicator sent three long email to Garda's counsel, essentially refuting point by point the arguments made in Garda's July 31 letter. These emails set the general tone of the following exchanges. The adjudicator blamed Garda and its counsel for not providing the information obtained from Mr. Smith in the *ex parte* communications and went as far as saying that this was "dishonest" (AR at 821). He also asked Garda to provide evidence on certain matters by way of affidavits and announced his intention to hold a new hearing where several witnesses would be heard, including the RCMP officer, the social worker, Ms. Rozsell, the Sobeys employee and a representative from the Ministry of Children's Services.

[54] On August 23, Garda's counsel responded and added more names to the list of witnesses suggested by the adjudicator. She announced her intention to call 20 witnesses, noting that some of these were necessary to respond to allegations of fraud or bad faith. The adjudicator responded the same day, saying that five days of hearings would be needed to accommodate so many witnesses.

[55] On August 27, however, the adjudicator wrote a formal letter to Garda's counsel, suggesting that it might not be necessary to convene a hearing in person. Rather, he asked counsel for Garda to provide affidavits from all proposed witnesses no later than September 3, that is, within seven days, including the Labour Day weekend. He also wrote that witnesses who were heard in April, or who "could or should have been called" on that occasion would not be able to testify at the new hearing. Remarkably, this applied to some of the witnesses he had himself suggested to call in his August 16 email. On August 30, Garda's counsel replied that it would not be possible to provide the requested affidavits before September 3, that this

requirement was a breach of procedural fairness and that Garda would apply for judicial review if the requirement were enforced.

[56] On September 4, the adjudicator sent an email to Garda's counsel, containing the following statement:

> Affidavits and information on various matters have previously been requested from Garda. It would seem legal counsel may have elected to ignore such requests. In the event these are not provided by 1:00 p.m. on Thursday, September 12, 2019 the Adjudicator will either deem you and your client to be in contempt of this Tribunal or seek the order of a Superior Court to issue an order holding your client, Garda, and\or legal counsel for Garda to be in contempt of this Tribunal. (AR at 850)

[57] Garda provided some of the information on September 12. The adjudicator did not take any steps to hold Garda or its counsel in contempt.

[58] In fact, blaming Garda's counsel appears to be the adjudicator's way of absolving himself of his procedural missteps, in particular his *ex parte* communications with Mr. Smith. Although this theme is frequently repeated in communications with Garda's counsel, for example in an email sent on December 24 (AR at 1570-1572), the adjudicator's position is clearly stated at page 12 of the second decision:

> While some of this information was to a limited extent contained in the evidence previously provided, the area remained vague. As a result, without including legal counsel in his queries, the Adjudicator asked the Complainant directly for such clarification and accepted the information provided by the Complainant's various emailed responses. These responses were not communicated to legal counsel for Garda until later.
>
> […]

> The Adjudicator was of the strong view it was delinquent of the employer, Garda, not to volunteer in the first instance the full significance of the daily activities of the Complainant in the course of carrying out his duties and responsibilities. The non-existence of any helpful explanation of the realities of the employee's day-to-day job seemed to leave a vacuum full of job titles. The absence of a full explanation required the Adjudicator to look into the matter further.

[59] This constant hostility towards Garda's lawyers, in particular the threat to hold them in contempt, is similar to, if not more serious than, the conduct of the judge that gave rise to a reasonable apprehension of bias in *Yukon Francophone School Board*.

[60] In reaching this conclusion, I am mindful that adjudicators must be able to manage actively the proceedings before them to achieve the Code's aim of a quick resolution of unjust dismissal complaints. In so doing, adjudicators may have to rein in lawyers who seek to lengthen proceedings for purely tactical purposes. Here, it is obvious that the adjudicator viewed Garda's request to call 20 witnesses as excessive—he wrote that this would be tantamount to "allow[ing] a circus" (AR at 1011). He was certainly entitled to refuse to hear some of them. Nevertheless, his hostility to Garda's counsel predated Garda's attempt to have 20 witnesses testify and manifested itself with respect to issues other than the number of proposed witnesses.

(4) Comments About Witnesses

[61] The adjudicator's comments regarding certain key witnesses also contribute to raising a reasonable apprehension of bias. These comments are found in the second decision, in emails sent to Mr. Smith and Garda's counsel and, surprisingly, in an email from the adjudicator to the Ministry of Children's Services. They suggest that the adjudicator firmly believed that Garda had

invented the story that Ms. Roszell made a complaint to the Ministry of Children's Services about the social worker and systematically expressed doubts when confronted with evidence that it actually happened.

[62] This evidence first came in the form of the "can say" statements of the RCMP officer who investigated the social worker's complaint. These statements confirmed that Ms. Roszell sent a complaint to the Ministry of Children's Services. They also express the officer's view that the pictures found in Ms. Roszell's complaint were obtained by Mr. Smith from Sobeys surveillance video. They mention the fact that the social worker recognized Mr. Smith and identified him as Ms. Roszell's boyfriend.

[63] After receiving the first "can say" statement, the adjudicator wrote to Garda's counsel, on August 16, and made negative comments about the statement (AR at 813). He suggested that it was improper for the officer to have reached any conclusion about the Sobeys incident without interviewing Mr. Smith and went as far as suggesting that the officer's supervisor should review his conduct. Yet, the officer states that he concluded that no criminal offence was committed. The adjudicator failed to appreciate that this might very well explain that the officer decided to apprise Mr. Smith's employer of the situation instead of interviewing him.

[64] In his second decision, he again disparaged the work of the RCMP officer in these terms (at p. 17):

> [The adjudicator] finds it somewhat bizarre that an RCMP officer would, in the normal course of his work, generously issue a statement, that included his assumptions and opinion on matters

> not directly investigated. […] Is it possible someone else told him certain things that were not actually under investigation?

[65] The same attitude is apparent with respect to the existence of Ms. Rozsell's complaint itself. At the April hearing, Ms. Roszell provided an affidavit denying ever sending a complaint to the Ministry of Children's Services. In his first decision, the adjudicator apparently gave credence to this version of events, when he wrote that "it is impossible to conclude whether any photographs taken of Sobeys CCTV screen ever made their way to the court of Family Child Services [*sic*]" (p 9). After this decision was retracted, Garda sought evidence of the complaint from the Ministry of Children's Services and asked the adjudicator to send a notice to appear to a representative of the Ministry. Despite his initial reluctance, the adjudicator eventually agreed. On November 1, the Ministry of Children's Services, through its lawyers, sent the adjudicator a copy of Ms. Roszell's complaint. The adjudicator's initial reaction was to allege that the copy he received was impossible to read. On November 3, he replied to the Ministry to request a clearer copy of the documents. He volunteered the following opinion (AR at 1074):

> It is my understanding that Opal Roszell complained to CFS about the Social Worker because of her online postings which gave all the world to see her face and physical address (and friends). If this was all then Ms. Roszell may have done a good service for your worker, and her future personal security.

[66] It appears that the adjudicator believed until very late in the process that Ms. Roszell never made any complaint to the Ministry of Children's Services. On November 6, that is, the day before the second hearing, the adjudicator wrote to Garda's junior counsel about scheduling issues, and mentioned that the representative from the Ministry would likely testify to the effect that Ms. Roszell never complained about the social worker (AR at 1334). How the adjudicator

could write this while having Ms. Roszell's complaint before him is puzzling, to say the least, and it appears to contradict his email of November 3, reproduced above.

[67] Moreover, after the second hearing, Ms. Roszell provided a sworn statement in which she admitted sending the complaint to the Ministry and explained that she gained access to the pictures of the social worker by accident, without Mr. Smith's knowledge. The adjudicator described his reaction in an email to Garda's counsel dated December 24:

> As you are probably aware, the Adjudicator was very surprised with Ms. Roszell's admission that she acquired the two supposed [photos of the social worker] from [Mr. Smith's] computer or camera system. (AR at 1571)

[68] He then proceeded to blame Garda's counsel for not obtaining this evidence earlier. In the second decision, he chose to believe Ms. Roszell's explanation that she obtained the pictures because her tablet was synchronized with Mr. Smith's smart phone.

[69] The common theme of these comments is that the adjudicator was unwilling to listen to evidence favourable to Garda, but was prepared to resort to every stretch of the imagination to construct a narrative favourable to Mr. Smith. A reasonable observer would conclude that the adjudicator did not have an open mind.

(5) Punitive Damages Award

[70] The substance of a decision may, in appropriate circumstances, raise a reasonable apprehension of bias: *Baker*; *Sawridge Band*. Care must be taken, however, as a decision-maker must inevitably choose between the competing arguments of the parties. Deciding in favour of

one of them is not tantamount to showing bias. Even a finding that a decision is unreasonable does not entail that the decision-maker was biased.

[71] Nonetheless, one aspect of the decision would lead a reasonable observer to apprehend bias: the punitive damages award. I come to this conclusion mainly because of the sequence of events leading to this award rather than its merits, although I note that the amount of $500,000 is far removed from the usual range of punitive damages awarded in employment law cases, which rarely, if ever, exceed $100,000. See, for example, *Tl'azt'en First Nation v Joseph*, 2013 FC 767, at paragraphs 48-56; *Spruce Hollow Heavy Haul Ltd v Madil*, 2015 FC 1182, at paragraphs 114-128; *Elgert v Home Hardware Stores Limited,* 2011 ABCA 112, at paragraph 102.

[72] The adjudicator did not mention punitive damages in his communications with the parties prior to his first decision. In particular, his *ex parte* communications with Mr. Smith do not touch upon the issue, even though he disclosed many other aspects of what would become the first decision. The only mention of punitive damages is found in an email to Economica Ltd., on June 28, in which he says (AR at 676):

> Because of the manner of the employee's dismissal (bad faith, gross misrepresentation of facts, lack of credibility of the Garda witnesses and emotional stress placed on the employee - all as further compounded by the termination of Garda Alberta management shortly after the Labour Code hearing I am considering awarding general exemplary damages in the range of $100,000.00. I assume that such damages are non taxable?

[73] Yet, the first decision does not mention punitive damages, even though it contains findings of bad faith against Garda. While the adjudicator retained jurisdiction, this was mainly motivated by the fact that Economica Ltd. had not yet forwarded its assessment of damages.

Economica Ltd. was never asked to assess the amount of punitive damages; it was only asked, as we saw above, whether they would be taxable. Thus, a reasonable observer would conclude that the adjudicator considered awarding punitive damages in the amount of $100,000, but finally decided that such damages were not warranted.

[74] Mentions of punitive damages begin to appear in the communications with the parties only after Garda asked the adjudicator to retract the first decision. In its July 31 letter, Garda objected to the award of a sum of $13,779 to compensate Mr. Smith for various expenses. In an email sent to Garda's counsel on August 16, the adjudicator stated that "If such costs are not supportable in law, the Adjudicator will consider the matter of punitive damages."

[75] Moreover, the evidence adduced after the adjudicator retracted the first decision did not provide any additional support for a punitive damages award. If anything, this evidence confirmed that the facts on which Garda based Mr. Smith's termination were true. It appears that the "independent actionable wrong" (*Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595) that the adjudicator identified as the basis for the punitive damages award is Garda's bad faith termination of Mr. Smith, a finding the adjudicator had already made in his first decision.

[76] Lastly, there is no logical explanation for the sudden jump from $100,000 to $500,000 in the amount awarded. Neither does the amount of $500,000 bear any relationship to the amount of $13,779 in costs, which, according to the adjudicator's August 16 email, was the reason why he considered awarding punitive damages.

[77] After a careful review of this sequence of events, and irrespective of the adjudicator's actual state of mind, a reasonable observer would be seriously concerned that the adjudicator made an extraordinary award of punitive damages in retaliation for Garda's request to retract the first decision.

[78] To reach this conclusion, I need not rely on the adjudicator's correspondence with a freelance legal researcher, in which he asked about the validity of his $13,779 award for Mr. Smith's expenses. Asking for clarification on a legal issue does not, in and of itself, indicate that the adjudicator had made up his mind on the issue.

(6) Timely Complaint, Waiver, Prejudice and Curing

[79] Mr. Smith argues that even if I were to find the adjudicator's conduct objectionable, Garda acquiesced in it, waived the right to complain or failed to complain in a timely manner. He also argues that the second hearing cured the flaws of the process leading to the first decision and that Garda failed to show any prejudice. I am unable to agree with these submissions.

[80] In analyzing these submissions, two legal principles are particularly relevant. First, a party who wishes to allege bias must do so on the first reasonable occasion: *Hennessey v Canada (Attorney General)*, 2016 FCA 180 at paragraphs 20-21; *Eckervogt v British Columbia*, 2004 BCCA 398 at paragraphs 47-48. One cannot wait for the outcome and allege bias if the decision is unfavourable. An early objection also gives the decision-maker the opportunity to put his or her view of the matter on the record. In that sense, failure to object may amount to a form of "waiver."

[81] Second, proof of actual prejudice is not necessary to reach a finding of reasonable apprehension of bias. This is because we recognize that it is impossible to inquire into the decision-maker's actual state of mind: *Hunt*, at paragraph 124; *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2016 ONCA 60 at paragraph 50. For the same reasons, subsequent events in the proceedings cannot "cure" partiality. To quote from the Supreme Court of Canada in *Newfoundland Telephone*, at 645: "The damage created by apprehension of bias cannot be remedied." See also *Oleynik*, at paragraph 51.

[82] Contrary to Mr. Smith's submissions, Garda complained of bias as soon as it discovered the *ex parte* communications. The July 31, 2019 letter to the adjudicator objected to these communications and asked the adjudicator to provide copies of them. While Garda framed the matter mainly as a procedural fairness issue, it also stated that "the Draft Preliminary Decision reaches a patently unreasonable conclusion and appears to be biased in favour of the Complainant." In my view, Garda complained at the earliest opportunity. That Garda did not seek the adjudicator's immediate recusal, or that it did not carry its threat to bring an application for judicial review, does not amount to waiver. In principle, the proceedings before the adjudicator must have reached their conclusion before a party applies for judicial review: *Sioux Valley Dakota Nation v Tacan*, 2020 FC 874. With the benefit of hindsight, it is easy to criticize Garda's reaction to the adjudicator's conduct for being not sufficiently decisive. In my view, one must be sensitive to the context in which Garda found itself, which provided no obvious and immediate solution.

[83] Moreover, one must not lose sight that the facts giving rise to a reasonable apprehension of bias kept accumulating over a prolonged period. Some of the communications between the adjudicator and Mr. Smith were revealed to Garda only after the application for judicial review was begun. Garda complained on several occasions of various instances of procedural unfairness, for example on August 30 (AR at 845). It also asked the Minister of Employment and Social Development to revoke the appointment of the adjudicator, to no avail (AR at 1155). Given the unusual circumstances, Garda could not have been expected to do more than what it did.

[84] Neither did Garda acquiesce in the adjudicator's *ex parte* communications with Mr. Smith by itself engaging in similar communications. While it is true that Garda's counsel sent emails to the adjudicator without copying Mr. Smith, she could legitimately expect that the adjudicator would forward these emails to Mr. Smith and that the reverse would occur. For example, when Mr. Smith wrote on June 7 to inform the adjudicator of the recent firing of certain Garda employees, the adjudicator forwarded the email to Garda's counsel the next day. Moreover, on June 21, the adjudicator forwarded copies of correspondence with Mr. Smith to Garda's counsel. The adjudicator did not forward any subsequent communications with Mr. Smith to Garda's counsel until after he rendered his first decision. There was nothing to alert Garda to the existence of these further communications between the adjudicator and Mr. Smith. One cannot acquiesce in what one does not know.

[85] Even assuming, contrary to established jurisprudence, that a procedural impropriety giving rise to a reasonable apprehension of bias can be cured, the second hearing did not cure the shortcomings of the process that led to the first decision. As I mentioned above, once he retracted

his first decision, the adjudicator began to show hostility towards Garda's lawyers. On August 16, in three long emails sent to Garda's counsel, he defended most of the findings he made in the first decision. This, together with his later comments about witnesses, would give any reasonable observer an apprehension that his mind was closed. A second hearing marred by such problems cannot be a cure for anything. In fact, a reasonable observer would apprehend that, despite having retracted his first decision, the adjudicator decided to maintain the substance of it in spite of whatever new evidence would be adduced and to punish Garda for seeking that retraction.

B. *Substantive Unreasonableness*

[86] Garda is also asking me to pronounce on the merits of the case, not only to hold that the adjudicator's decision is substantively unreasonable, but also to dismiss the complaint myself. It argues that Mr. Smith's account of the Sobeys incident is implausible and that his position in this regard evolved over time. It also says that Ms. Roszell is not a credible witness, as she first denied making a complaint to the Ministry of Children's Services, only to recant her testimony when evidence of the actual complaint surfaced. Moreover, Garda argues that the evidence shows that Mr. Smith was a manager who is not entitled to make a complaint for unjust dismissal under the Code. Lastly, the amount of punitive damages would be unreasonable. On all these issues, there would be, according to Garda, only one reasonable outcome.

[87] I decline to rule on the merits of the case. Like most applicants for judicial review, Garda is understandably eager to see this matter come to an end. Nevertheless, the general rule is that the matter must be returned to the decision-maker designated by Parliament: *Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paragraphs 139-142. Reviewing courts should not substitute themselves for the initial decision-maker.

[88] Sending the matter back is unavoidable in cases of reasonable apprehension of bias. The reviewing court cannot rely on findings made by a potentially biased decision-maker. Moreover, the oral evidence was not recorded and there is no reliable transcript of the hearings. It would be a hazardous task to attempt to reach a decision on the merits in such conditions.

IV. Disposition and Costs

[89] For the foregoing reasons, Garda's application for judicial review will be allowed and the matter will be sent back for a new hearing before a different adjudicator.

[90] I note that the Code was recently amended to give jurisdiction to the Canadian Industrial Relations Board over unjust dismissal complaints. According to section 383 of the *Budget Implementation Act, 2017, No. 1*, SC 2017, c 20, subsection 240(1) of the Code continues to apply in its previous form to any complaint made before the day on which the section came into force. Section 383 came into force on July 29, 2019, as set by the *Order Fixing July 29, 2019 as the Day on which Certain Provisions of that Act Come into Force,* SI-2019-76, (2019) Can Gaz II, 153. As Mr. Smith made his complaint before that date, the matter must be sent back to an adjudicator and not to the Canadian Industrial Relations Board.

[91] Costs usually follow the event. In this case, however, each party should bear its own costs, as the outcome is mainly the result of the adjudicator's serious misunderstanding of his

role. Mr. Smith, who was not represented before the adjudicator, cannot be blamed for this and be made responsible for Garda’s costs.

JUDGMENT in file T-162-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision rendered by the adjudicator on January 29, 2020 is quashed.
3. The matter is sent back to another adjudicator appointed under the Canada Labour Code for redetermination.
4. No order is made as to costs.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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