Date: 20071018

Docket: T-1595-03

Citation: 2007 FC 1065

Ottawa, Ontario, October 18, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

DENNIS NOWOSELSKY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Dennis Nowoselsky appeals from the order of a prothonotary acting as a case-manager. The prothonotary refused to grant him an extension of time in which to file affidavits and other documentary material in support of his application for judicial review of a decision of the Canadian Human Rights Commission dismissing his human rights complaint. Mr. Nowoselsky further seeks a stay of the scheduling order made by the prothonotary until such time as his appeal is disposed of.

[2] Mr. Nowoselsky asserts that he was denied a fair hearing before the prothonotary. According to Mr. Nowoselsky, the conduct of the prothonotary in this proceeding, as well as in an earlier proceeding involving Mr. Nowoselsky, demonstrates that the prothonotary was biased

against him. In the alternative, Mr. Nowoselsky says that, at a minimum, he has a reasonable apprehension that she was biased against him.

[3] Mr. Nowoselsky further submits that the prothonotary erred in denying him leave to file affidavits and other documentary material in support of his application, and that the material was relevant to the issues raised by his application for judicial review.

[4] For the reasons that follow, I cannot agree. As a consequence, the appeal will be dismissed.

Background

[5] In order to put Mr. Nowoselsky's submissions into context, particularly as they relate to the allegations of bias on the part of the prothonotary, it is necessary to have some understanding of the long and tortuous history of the legal proceedings in which Mr. Nowoselsky has been involved with respect to his employment, including, but not limited to, this application for judicial review.

[6] Mr. Nowoselsky worked for many years as a parole officer for the Correctional Service of Canada in Prince Albert, Saskatchewan. During the course of his employment, Mr. Nowoselsky was very active in union activities.

[7] In 1995, it was announced that parole officers in Prince Albert would be required to assume some clerical duties, including typing reports. This caused Mr. Nowoselsky some concern, as one of his fingers had been amputated, and a second finger was damaged as a result of a childhood

accident. Mr. Nowoselsky asserts that he sought the accommodation of his disability, which his employer refused to provide.

[8] In 1996, a number of issues were raised with respect to Mr. Nowoselsky's conduct, which led to a series of investigations. The result of these investigations was that Mr. Nowoselsky's employment with the CSC was terminated for misconduct on November 16, 1998.

[9] Mr. Nowoselsky initiated a series of grievances in relation to his employer's conduct towards him, including a grievance with respect to the termination of his employment. These grievances were ultimately dealt with by the Public Service Staff Relations Board.

[10] In the meantime, in October of 1997, Mr. Nowoselsky contacted the Canadian Human Rights Commission, asserting that the CSC had discriminated against him in the course of his employment, by failing to accommodate his disability.

[11] In August of 1998, the Commission declined to deal with Mr. Nowoselsky's complaint at that time, as he was pursuing these matters through the grievance process.

[12] After a lengthy hearing before the PSSRB, the Board released its decision on February 26, 2001, dismissing Mr. Nowoselsky's grievances. The PSSRB found that CSC was justified in terminating Mr. Nowoselsky's employment because of his misconduct.

[13] The PSSRB decision also addressed Mr. Nowoselsky's allegation that CSC had breached its duty to accommodate his disability, finding that while the employer "might have been more pro-active in addressing this issue" so too could Mr. Nowoselsky. The PSSRB found that there was no evidence that Mr. Nowoselsky had raised the issue of his disability with CSC's human resources personnel prior to the allegations of misconduct arising. Moreover, the PSSRB found that as an active union member, Mr. Nowoselsky would have been fully aware of his rights in this regard.

[14] The PSSRB further found as a fact that when he did raise the issue of his disability with management, Mr. Nowoselsky failed to follow up with his supervisor, as he had been directed to do, in order to identify suitable accommodative measures. The PSSRB also found that Mr. Nowoselsky had refused to attend a medical assessment, and had provided no explanation for failing to do so.

[15] Mr. Nowoselsky sought judicial review of the PSSRB's decision. On June 30, 2005, following a Status Review, his application for judicial review was dismissed for delay. Mr. Nowoselsky endeavoured to appeal this decision, but failed to do so in a timely manner.

[16] Mr. Nowoselsky points out that the prothonotary who dismissed his application for judicial review of the PSSRB decision is the same prothonotary whose ruling forms the subject matter of this appeal.

[17] On March 19, 2002, the Commission agreed to examine Mr. Nowoselsky's human rights complaint. A Commission investigation resulted in a report recommending that Mr. Nowoselsky's

complaint be accepted, notwithstanding the fact that it had been filed outside of the one year period provided for in the *Canadian Human Rights Act*.

[18] However, the Commission investigator went on to recommend that the complaint be dismissed, as the matters complained of had been addressed by a procedure provided for under another Act of Parliament.

[19] In coming to this conclusion, the investigator considered whether there were outstanding human rights issues raised by Mr. Nowoselsky that had not been dealt with by the PSSRB. In an effort to fully address this question, the investigator sought information from Mr. Nowoselsky with respect to:

> - his position as to why the Commission should proceed with an investigation into his complaint;
> - details of the human rights issues (ie. failure to accommodate his disability; and termination of his employment because of his disability), which were not dealt with by the grievance process;
> - details of any evidence (witnesses or documentation), which would support his allegations that his disability was not accommodated and that his employment was terminated because of his disability, which had not been taken into consideration by the other process.

[20] Mr. Nowoselsky elected not to provide the requested information to the Commission investigator, asking instead that the Commission conduct a thorough independent investigation of his complaint.

[21] The Commission investigator then recommended that the Commission dismiss Mr. Nowoselsky's human rights complaint pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*. In this regard, the investigator noted that the human rights issues raised by the complaint had been dealt with by the PSSRB, and that there were no outstanding human rights issues that had not been dealt with.

[22] The investigator further observed that Mr. Nowoselsky had provided no reason why the matter should be further investigated, and there was no public interest to be served by conducting a further investigation.

[23] This recommendation was accepted by the Commission. By letter decision dated July 30, 2003, the Commission advised Mr. Nowoselsky that it had concluded that his complaint would not be referred to the Canadian Human Rights Tribunal, as the matters that he had complained of had already been addressed by the PSSRB, and that, as a result, no further enquiry was warranted.

[24] It is this decision that underlies this application for judicial review.

The Procedural History of this Application for Judicial Review

[25] The application for judicial review was commenced on August 28, 2003. Mr. Nowoselsky's Notice of Application named the Canadian Human Rights Commission as the respondent. On September 16, 2003, the Commission wrote to the Court advising that it was of the opinion that it had been improperly named as the respondent in Mr. Nowoselsky's Notice of Application.

[26] Apart from an exchange of correspondence regarding the identity of the proper respondent, it appears that nothing happened in this case until a Notice of Status Review was issued on March 30, 2004.

[27] After reviewing the parties' submissions on the matter, on May 28, 2004, the prothonotary allowed the application to continue as a specially managed proceeding, with the caveat that Mr. Nowoselsky act promptly to identify the proper respondent and commit to a procedure to rectify any error in the style of cause.

[28] In relation to the misnomer issue, the prothonotary stated that "counsel appears to have been as ineffective as the Applicant in forging a solution to the perceived problem."

[29] The prothonotary also noted that Mr. Nowoselsky was in default of serving and filing affidavits required under Rule 306. Consequently, she ordered that Mr. Nowoselsky seek an extension of time in which to file his supporting affidavits, and that he do so no later than June 30, 2004.

[30] In response to this order, on June 18, 2004, Mr. Nowoselsky brought a motion to amend the style of cause, and for an extension of time to amend and serve his Notice of Application. Mr. Nowoselsky also requested that he be granted an extension of time to prepare, file and serve his affidavit and documentary exhibits.

[31] On August 5, 2004, the prothonotary dismissed Mr. Nowoselsky's application to amend the style of cause and for an extension of time within which to file his affidavits, noting that Mr. Nowoselsky had provided no explanation for his failure to file his affidavits within the eight months following the filing of his Notice of Application.

[32] The prothonotary further noted that Mr. Nowoselsky had not filed the proposed affidavits, despite having had sufficient time to do so. Finally, the prothonotary observed that having dismissed Mr. Nowoselsky's application for an extension of time, his application to amend the style of cause became moot.

[33] The prothonotary's decision was ultimately overturned by the Federal Court of Appeal: see *Nowoselsky v. Canada (Canadian Human Rights Commission)*, 2006 FCA 382. In so doing, the Federal Court of Appeal held that:

> With respect, we are of the view that the prothonotary erred in principle. The issue of delay was disposed of when the prothonotary decided to allow the matter to proceed as a specially managed proceeding. The delay which the appellant was called upon to explain in responding to the notice of status review was the delay in filing the affidavits required by Rule 306 … Having accepted the appellant's explanation, and having put the matter into case management, the prothonotary erred in requiring the latter to address a question she had already decided.
>
> […] As for the prothonotary's second ground for dismissing the appellant's motion, it is apparent that the prothonotary did not credit the appellant for having complied with her order according to its terms. The appellant's interpretation of what the order required him to do was not unreasonable.

[34] In disposing of the matter, the Federal Court of Appeal ordered that Mr. Nowoselsky serve and file affidavits and documentary evidence required by Rule 306 of the *Federal Courts Rules* within 45 days of the order (or January 5, 2007), as well as any jurisprudence that he sought to rely upon in order to enable the Prothonotary "to assess whether there was relevant and admissible evidence in support of the pending application for judicial review."

[35] In an attempt to comply with the order of the Federal Court of Appeal, Mr. Nowoselsky filed nine affidavits, a memorandum of fact and law and a bound volume of documents with the Court of Queen's Bench in Regina on January 4, 2007. Not only did Mr. Nowoselsky file his documents in the wrong court, he evidently also miscalculated the time limits due to the Christmas holidays. As a consequence, Mr. Nowoselsky did not comply with the deadline set by the order of the Federal Court of Appeal.

[36] Moreover, the documents he filed did not conform to the requirements of the *Federal Courts Rules*.

[37] On February 20, 2007, Justice Létourneau ruled that Mr. Nowoselsky should be deemed to have served and filed his material on time and within the period allowed by the Federal Court of Appeal's decision. Justice Létourneau also granted Mr. Nowoselsky an additional 30 days in which to conform to the requirements of Rule 306.

[38] At some point in this chronology, Mr. Nowoselsky sought the assistance of counsel. In an attempt to comply with the second order of the Federal Court of Appeal, counsel from the firm of Balfour Moss LLP submitted a letter to the Court in which it stated that nine affidavits and a letter from Dr. Rabuka were part of the record before the Commission, and were therefore properly filed with the Court pursuant to Rule 309 of the *Federal Courts Rules*.

[39] In addition, counsel stated that the affidavit of Fred Payton had been provided to the Commission after it had rendered its decision, and was, therefore, properly filed with the Court pursuant to Rule 306. Counsel further submitted that a bound volume of documents, which were unsupported by an affidavit "may be submitted later in these proceedings pursuant to Rule 309". Finally, it was submitted that the memorandum of fact and law was properly filed under Rule 309.

[40] By letter dated April 17, 2007, counsel for the Attorney General asked for clarification of the status of Balfour Moss LLP. Counsel noted that while the Federal Court of Appeal had observed that the firm had agreed to assist Mr. Nowoselsky in putting his material in proper form, the firm had since made representations on Mr. Nowoselsky's behalf and had served and filed documents on his behalf, without appearing as counsel of record.

[41] As counsel noted, this raised ethical issues with respect to counsel's ability to continue to deal directly with Mr. Nowoselsky. Counsel further observed that in the circumstances, Rule 123 of the *Federal Courts Rules* would operate to deem Balfour Moss LLP to be solicitors of record for Mr. Nowoselsky.

[42] On April 27, 2007, the prothonotary issued a seven page order dealing with the status of Balfour Moss LLP, which was highly critical of the firm's conduct. After reviewing the situation in some detail, and noting the problems that could result from the uncertain status of Balfour Moss LLP, the prothonotary held that the Court would not consider the firm's communications and submissions unless the law firm confirmed that it was authorized by Mr. Nowoselsky to act as its solicitor of record when it made communications to the Court and to the Respondent's counsel from February 20 to April 20, 2007.

[43] Confirmation of the firm's authority to act on Mr. Nowoselsky's behalf was subsequently provided to the Court.

[44] The prothonotary then proceeded to re-determine Mr. Nowoselsky's motion for an extension of time within which to serve and file his affidavits under Rule 306, as directed by the Federal Court of Appeal.

The Order Under Appeal

[45] On June 6, 2007, the prothonotary rendered her order in respect of Mr. Nowoselsky's motion for a re-determination of an extension of time within which to serve and file his affidavits under Rule 306. This is the order under appeal.

[46] The prothonotary observed that the decision of the Federal Court of Appeal required her to rule solely on the relevance and admissibility of the affidavits and evidence sought to be filed by Mr. Nowoselsky, which included the following documents:

a) Affidavit material including:

1. Affidavit of Dennis Nowoselsky, sworn August 13, 2001
2. Affidavit of Raymond Gosselin, sworn August 9, 2001
3. Affiadavit of Velera L. Thorpe, sworn August 9, 2001
4. Affidavit of Della Hunter, sworn August 9, 2001
5. Affidavit of Alan Beasley, sworn August 10, 2001
6. Affidavit of Lawrence F. Bell, sworn August 13, 2001
7. Affidavit of Darlene McDougal, sworn March 27, 2002
8. Affidavit of Audrey Johnson, sworn March 25, 2002
9. Affidavit of Fred Payton, sworn December 13, 2004

(b) A letter from Dr. Rabuka dated November 14, 1997

(c) A bound volume of documents; and

(d) A memorandum of fact and law on behalf of the Applicant.

[47] The prothonotary noted that Mr. Nowoselsky's submissions did not address the relevance of the documents in question, and were focussed "primarily on the admissibility of these documents and on the contention that, with the exception of the affidavit of Fred Payton dated December 13, 2004, the documents 'are currently filed under Rule 306 and can in any event be properly filed as

part of the Applicant's record pursuant to Rule 309, because they were part of the record before the Canadian Human Rights Commission'".

[48] In this regard, the prothonotary observed that: "[u]nfortunately for the Applicant, apart from the Applicant's bald statement to that effect made in his written submissions, there is no evidence before me that any of those affidavits and documents formed part of the record before the CHRC."

[49] The prothonotary noted that the documents transmitted to the Commission pursuant to Mr. Nowoselsky's Rule 317 request did not contain any of the affidavits in question, nor did they contain any of the other documents sought to be filed by Mr. Nowoselsky.

[50] The prothonotary also observed that Mr. Nowoselsky had previously asked that the Commission forward its entire investigation file to the Court, and that the Commission had objected to its disclosure, stating that the investigation file had not been before the Commission when it rendered its decision, and that the only documents before the Commission when it made the decision under review were those that had already been provided to the Court in accordance with Rule 317. Mr. Nowoselsky did not seek directions or a ruling from the Court in relation to the Commission's objection to producing these documents.

[51] As a consequence, the prothonotary concluded that the documents were not admissible under either Rule 306 or 309, as part of the record that was before the Commission.

[52] The prothonotary then considered whether the documents were otherwise relevant or admissible. In making this determination, the prothonotary examined the affidavits and documents themselves, and also considered the Notice of Application, and the grounds cited therein as to the errors allegedly committed by the Commission.

[53] The prothonotary noted that the first six affidavits were originally filed with the Court in connection with Mr. Nowoselsky's application for judicial review of the decision of the PSSRB. In this regard, the prothonotary stated:

> I fail to see how affidavits filed in a judicial review proceeding, which judicial review proceeding was dismissed, could possibly be relevant or admissible in the context of a different judicial review of a different decision by a different tribunal. The answer to that question does not appear from any of the submissions of the Applicant, from a careful review of the notice of application, or from the decision of the Canadian Human Rights Commission itself. In fact, the entire enterprise smacks of an impermissible attempt by Mr. Nowoselsky to collaterally attack the decision of the adjudicator on his grievances and of this Court in dismissing his judicial review of that decision.

[54] With respect to the affidavits of Darlene McDougal and Audrey Johnson, the prothonotary observed that these affidavits related to events that occurred at a staff meeting in the fall of 1995, where Mr. Nowoselsky allegedly raised the issue of his disability with his area manager. In this regard, the prothonotary stated:

> The relevance of this evidence to the legality or lawfulness of the CHRC's decision not to deal with the Applicant's complaints because they had been addressed by a grievance by the PSSRB is nowhere explained by the material filed by the Applicant and remains a mystery even on a most generous reading of the application for judicial review. Once again, it appears that this evidence is directed

> to an attempt to review on the merits the decision of the adjudicator on the grievance.

[55] With respect to the letter from Dr. Rabuka, the prothonotary noted that there was no evidence that the document had been before the Commission, nor was it supported by an affidavit. Moreover, insofar as the document's relevance was concerned, the prothonotary stated that "it speaks to the Applicant's disability and his ability to perform his duties. No relevance can be discerned to the subject matter of this judicial review application".

[56] Insofar as the volume of bound documents was concerned, the prothonotary found that like the letter from Dr. Rabuka, the volume was inadmissible as it was not introduced through an affidavit nor was it part of the tribunal record. Moreover, she noted that with the exception of a few pages, the documents did not relate to the decision process of the Commission and were therefore irrelevant.

[57] Finally, the prothonotary addressed Mr. Nowoselsky's memorandum of fact and law, observing that it was not an affidavit or other documentary evidence which would be admissible for filing under Rule 306, but rather was intended to be filed in accordance with Rule 309. As a result, a ruling under Rule 306 was not required.

[58] The prothonotary then went on to note that a review of the content of the memorandum of fact and law confirmed her conclusions with respect to the apparent purpose of the affidavits and

documents, which was “a clear and unequivocal attempt to review the merits of the adjudicator’s decision on [Mr. Nowoselsky’s] grievances.

[59] While she was aware that she was not being called upon to rule on the appropriateness of the proposed memorandum of fact and law, the prothonotary stated that if it was Mr. Nowoselsky’s intention to file the memorandum under Rule 309 “It behooves me as case-manager, to indicate at this early stage that the argument presented in that memorandum is wholly irrelevant to a judicial review of the CHRC decision, as it is framed in the notice of application and as is by law permissible”.

[60] Moreover, given her ruling with respect to the admissibility of the affidavits and other documentary evidence, the arguments were unsupported by evidence. The prothonotary went on to recommend that if Mr. Nowoselsky were to proceed with his judicial review of the Commission’s decision, he should consider a more appropriate memorandum of fact and law.

[61] Finally, the prothonotary addressed the affidavit of Fred Payton. Mr. Payton was one of Mr. Nowoselsky’s supervisors at CSC. The prothonotary described this document as the only affidavit tendered in accordance with Rule 306. The prothonotary noted that the affidavit dealt solely with the claim that Mr. Nowoselsky had raised the issue of his physical disability with Mr. Payton, and that Mr. Payton had in turn raised it with his supervisor. Consequently, the prothonotary held that the affidavit was irrelevant to the application to review the Commission’s decision.

[62] Having determined that none of the affidavits submitted by Mr. Nowoselsky pursuant to the judgment of the Federal Court of Appeal were relevant, and that none of the documents submitted by him were either admissible or relevant, it followed that Mr. Nowoselsky's motion for an extension of time in which to file the material should be dismissed.

[63] The prothonotary then stated that as a result of her ruling, none of the documents would form part of the record on the application for judicial review. The only document that could be included in Mr. Nowoselsky's application record was the certified tribunal record. The prothonotary further ruled that the respondent would have no right to serve and file affidavits and documentary exhibits as of right, pursuant to Rule 307.

Standard of Review

[64] Mr. Nowoselsky's bias argument raises a question of procedural fairness. The issue of the standard of review does not arise in relation to such questions – it is for the Court to determine whether the individual received a fair hearing or not, having regard to all of the relevant circumstances: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, at ¶ 52-53.

[65] Insofar as the standard of review with respect to the merits of the prothonotary's decision is concerned, where a discretionary order of a prothonotary is vital to the final issue in a case, the decision should be reviewed on a *de novo* basis: see *Merck & Co. Inc. v. Apotex*, [2003] F.C.J. No. 1925, 2003 FCA 488 at ¶18-19.

[66] However, where the decision under review is not vital to the final issue in the case, it ought not to be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck*, at ¶19

[67] Mr. Nowoselsky submits that the issues before the prothonotary were clearly vital to the final issue of the case, as the decision fundamentally affects his ability to present his case in this proceeding. As a consequence, Mr. Nowoselsky says that the matter should be reviewed on a *de novo* basis.

[68] The first question, then, is whether the prothonotary's decision was vital to the final issue in this case. In this regard, the decision in *Merck* makes it clear that the reference to a "question vital to the final issue of the case" refers to the subject matter of an order issued by a prothonotary, and not to the effect of such an order.

[69] As to what sort of questions will be viewed as vital to the final issues in a case, *Merck* teaches that the test is a stringent one. Examples of vital issues were cited by Justice Reed in *James River Corp. of Virginia v. Hallmark Cards, Inc.*, (1997), 72 C.P.R. (3d) 157 (F.C.T.D.) where she stated that:

> Questions that are vital to the final issues of a case are, for example, the entering of default judgment, a decision not to allow an amendment to pleadings, a decision to add additional defendants and thereby potentially reduce the liability of the existing defendant, or a decision on a motion for dismissal for want of prosecution. [at page 160, footnotes omitted]

[70] As my colleague Justice Blanchard noted in *Association des crabiers acadiens inc. v. Canada (Attorney General)*, [2005] F.C.J. No. 1591, 2005 FC 1309 (at ¶25), an order striking out an affidavit is not vital to the final issue in a case, as the order does not to affect the party's substantive rights as the application for judicial review could still proceed.

[71] In a similar vein, an order refusing to allow a party an extension of time in which to file affidavit material is not vital to the final issue in a case, and thus attracts the more deferential standard of review.

[72] As a consequence, I should not interfere with the prothonotary's decision unless I am satisfied that the order is clearly wrong, in the sense that it was based upon a wrong principle or upon a misapprehension of the facts

The Bias Issue

[73] The first issue that must be addressed is Mr. Nowoselsky's assertion that he did not receive a fair hearing before the prothonotary as she was biased against him, or that, at the very least, her conduct throughout this matter - and in related litigation - was such as to create a reasonable apprehension of bias on the part of the prothonotary.

[74] In this regard, Mr. Nowoselsky relies on the following circumstances in support of his allegation of actual or apprehended bias on the part of the prothonotary:

1. It was the prothonotary whose decision is in issue in this proceeding who had dismissed his application for judicial review relating to the PSSRB decision for delay, when Mr. Nowoselsky's then counsel had only been two weeks late in meeting a filing deadline.
2. The prothonotary's original order of August 5, 2004 dismissing Mr. Nowoselsky's motion for an extension of time demonstrated a negative predisposition with respect to the merits of Mr. Nowoselsky's application for judicial review.
3. The Federal Court of Appeal determined that in making her August 5, 2004 order, the prothonotary erred in principle. The prothonotary was aware of this ruling, and the fact that she had been criticized by the Federal Court of Appeal, which would arguably lead her to harbour an animus towards Mr. Nowoselsky.
4. The prothonotary's April 27, 2007 order regarding the status of Balfour Moss LLP includes a number of gratuitous and derogatory comments about the firm, and is "an astonishing exercise that conjures up blameworthy conduct on the part of the firm". This, after the prothonotary had already criticized Mr. Nowoselsky's earlier counsel in her May 28, 2004 ruling.
5. In making her June 6, 2007 order, which is the decision under appeal, the prothonotary was clearly frustrated by the delays with the progress of this matter, failing to appreciate that the delays were largely the result of her own error in her August 5, 2004 order.
6. In her June 6, 2007 order, the prothonotary, on her own initiative, made a pre-emptive ruling with respect to the contents of Mr. Nowoselsky's application record,

when that issue was not before her, and without allowing him to make submissions in this regard.

7. The prothonotary further acted unfairly in examining the contents of Mr. Nowoselsky's memorandum of fact and law in the course of her analysis, when the memorandum of fact and law had been "filed prematurely", and was not the subject of the motion.

8. Throughout her dealings with Mr. Nowoselsky, the prothonotary used harsh and hyperbolic language which was both undeserved and highly critical of Mr. Nowoselsky and his counsel.

9. The prothonotary never gave directions to Mr. Nowoselsky as to what procedural steps he had to follow to allow his application for judicial review to proceed properly.

[75] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394.

[76] An allegation of bias, especially an allegation of actual, as opposed to apprehended, bias, is a serious allegation. Indeed, it challenges the very integrity of the adjudicator whose decision is in

issue. As a consequence, the threshold for establishing bias is high: *R. v. S.* (R.D.), [1997] 3 S.C.R. 484, at ¶ 113.

[77] With these principles in mind, I turn now to consider Mr. Nowoselsky's arguments. At the outset, I should observe that the only decision directly before me on this appeal is the prothonotary's June 6, 2007 order denying Mr. Nowoselsky an extension of time in which to file affidavits and documentary material in support of his application for judicial review. I am not sitting in appeal of any of the prothonotary's earlier rulings made in the course of this or related proceedings, and it is not my role to second-guess any of those rulings.

[78] Thus, the question before me is not whether these earlier rulings were made in error, but rather, whether the cumulative effect of all of Mr. Nowoselsky's dealings with the prothonotary over the course of this and related proceedings demonstrates actual or apprehended bias on her part, such that he was denied a fair hearing on the motion in issue in this appeal.

[79] Having considered all of the grounds advanced to support his claim of bias, both individually and cumulatively, and having carefully considered Mr. Nowoselsky's submissions, I have concluded that he has not established either actual bias or a reasonable apprehension of bias on the part of the prothonotary.

[80] The fact that a decision-maker may have ruled against a party in previous proceedings does not, by itself, give rise to a reasonable apprehension of bias, nor is it evidence of actual bias.

[81] Similarly, I am not persuaded that the fact that the prothonotary's original order of August 5, 2004 dismissing Mr. Nowoselsky's motion for an extension of time was overturned by the Federal Court of Appeal would reasonably be perceived to create a bias on her part.

[82] Decision-makers strive to do the best they can, but errors do occur, which is why we have an appellate process. Nevertheless, absent compelling evidence to the contrary, one expects that both the oath of office and the professionalism of the decision-maker in question would lead the individual to continue to deal with parties in a fair and impartial manner, even where the decision-maker is found to have erred in earlier proceedings.

[83] I cannot agree that the prothonotary acted unfairly in examining the contents of Mr. Nowoselsky's memorandum of fact and law in the course of her analysis in the decision under appeal, when the memorandum had, according to Mr. Nowoselsky "been filed prematurely", and was not the subject of the motion.

[84] Having reviewed the material that Mr. Nowoselsky has filed in the course of his efforts to get the material that he wants before the Court on this application for judicial review, it is difficult to discern what the issues are on the underlying application, and precisely what his arguments are in this regard. In these circumstances, I see nothing improper in the prothonotary actually reading the

memorandum of fact and law provided to her by Mr. Nowoselsky, in what was clearly an effort on the part of the prothonotary to gain a better understanding of the basis for his attack on the decision of the Commission.

[85] I also do not agree that in making the decision under appeal, the prothonotary manifested frustration with the delays in the progress of this matter, while failing to appreciate that the delays were largely the result of her own error. The decision under review reflects a clear desire on the part of the prothonotary to have this case proceed quickly to a hearing. Given that judicial review is intended to be a summary procedure, this was quite properly part of her role as case-manager.

[86] I am further not persuaded that the prothonotary's June 6, 2007 order represents "a pre-emptive ruling with respect to the contents of Mr. Nowoselsky's application record". Having denied Mr. Nowoselsky an extension of time in which to file evidence in support of his application for judicial review, it necessarily follows that he would only be able to rely on the certified tribunal record and his memorandum of fact and law in support of his application.

[87] I do agree with Mr. Nowoselsky that the prothonotary has used some very blunt language in the various rulings that she has rendered in this matter, and that her choice of language was at times unfortunate, particularly in the April 27, 2007 ruling regarding the status and conduct of Balfour Moss LLP.

[88] That said, blunt language by itself is not evidence of actual bias, nor does it give rise to a reasonable apprehension of bias: see *Ahani v. Canada*, (2000), 184 F.T.R. 320 (F.C.A.).

[89] Having reviewed the totality of the record before me, and viewing the language used by the prothonotary in the context of the history of this matter, I am not persuaded that she has manifested actual bias in this matter. Nor am I persuaded that a reasonable apprehension of bias exists with respect to the conduct of the prothonotary.

[90] This then takes me to consider the appeal as it relates to the merits of the prothonotary's decision.

Did the Prothonotary Err in Denying the Extension of Time?

[91] As a preliminary matter, I must address the fresh evidence that Mr. Nowoselsky seeks to put before the Court on this appeal.

[92] In the decision under appeal, the prothonotary observed that there was no evidence before her that some of the documentation that Mr. Nowoselsky sought to put before the Court was actually before the Canadian Human Rights Commission when it made the decision under review.

[93] In support of his appeal, Mr. Nowoselsky has provided an affidavit in which he deposes that the documentation in question was provided to the Commission investigator in the course of the investigation.

[94] It is well established in the jurisprudence of this Court that, subject to limited exceptions that do not apply here, new evidence should not be admitted on an appeal from a decision of a prothonotary. Rather, the Court should proceed on the basis of the record that was before the prothonotary at the time that the decision was made: see, for example, *Advanced Emissions Technologies Ltd. v. Dufort Testing Services*, [2006] F.C.J. No. 1012, 2006 FC 794, at paras. 2 and 3, and *Odessa Partnership v. Canada (Department of National Revenue)*, [2003] F.C.J. 1814, 2003 FC 1420.

[95] As a consequence, I do not intend to consider the new evidence on this appeal, other than to simply observe that even if Mr. Nowoselsky did in fact provide the documents in question to the Commission investigator, this does not mean that the documents were before the Commissioners themselves when they made the decision under review. Indeed, the fact that the documents in question were not included in the certified tribunal record suggests that they were not.

[96] With respect to the merits of the prothonotary's decision, in deciding whether to grant Mr. Nowoselsky an extension of time in which to file his affidavit material the prothonotary properly identified the issue before her as whether the proposed evidence was admissible and relevant to the issues on the application for judicial review.

[97] With respect to the letter from Dr. Rabuka and the volume of bound documents, the prothonotary quite properly noted this material was not supported by an affidavit. As such it was

not admissible. Thus, the prothonotary did not err in refusing an extension of time to file this material.

[98] With respect to the affidavit material, six of the affidavits (Nowoselsky, Gosselin, Thorpe, Hunter, Beasley and Bell) were evidently originally filed with the Court in connection with Mr. Nowoselsky's application for judicial review of the decision of the PSSRB. Given this, it is perhaps not surprising that the affidavits make no mention of the Canadian Human Rights Commission investigation or decision. Rather, the focus of the affidavits is on the merits of the PSSRB decision.

[99] For example, Mr. Nowoselsky's affidavit discusses at great length what transpired at the PSSRB hearing, and takes issue with the weight ascribed by the adjudicator to various pieces of evidence in that case.

[100] The other five affidavits are from individuals who testified at the PSSRB hearings. These affidavits refer to the deponents' evidence before the Board. In some cases, the deponents take issue with the weight ascribed to their evidence. In other cases, the affidavits point to alleged errors in the PSSRB decision.

[101] The prothonotary stated that she could not see how affidavits filed in one judicial review proceeding could possibly be relevant or admissible in the context of a different judicial review of a different decision by a different tribunal. The fact is that the Commission's decision dismissing Mr. Nowoselsky's human rights complaint was based upon the Commission's finding that his human

rights issues had been dealt with by the PSSRB. As a consequence, there is of necessity some overlap between the two cases, and affidavits relating to the PSSRB process could at least theoretically be relevant on a judicial review challenging the Commission's decision.

[102] That said, it is hard to see how the specific affidavits in issue here relate to the issues raised by Mr. Nowoselsky on his application for judicial review.

[103] Mr. Nowoselsky's Notice of Application for Judicial Review cites the following as the grounds for his application:

> (5) The Commission failed […] to properly apply Section 44 of the *Canadian Human Rights Act*.
> (6) The Human Rights Commission failed to properly […] accord the *Canadian Human Rights Act* of paramountcy over the PSSRB.
> (7) The Commission failed to adhere to mandatory provisions of the *Canadian Human Rights Act* Section 44.
> (8) The Commission acted without jurisdiction, acted beyond their jurisdiction or refused to exercise their jurisdiction.
> (9) The Commission failed to observe the principles of *natural justice, procedural fairness* or the procedure that the Commission was required by law and act to observe.

[104] The six affidavits under consideration really do not have any bearing on any of these issues. Rather, as the prothonotary observed, they really amount to a collateral attack on the decision of the adjudicator.

[105] It must be kept in mind that the issue at this point is not whether the decision of the PSSRB was flawed. As a result of Mr. Nowoselsky's failure to pursue his application for judicial review of

that decision in a timely manner, the PSSRB is now final. Rather the central issue on this application is whether the Canadian Human Rights Commission erred in finding that Mr. Nowoselsky's human rights issues had been dealt with by the PSSRB.

[106] It is true that evidence provided to a human rights investigator can be admissible on judicial review where there is an allegation impugning the accuracy or completeness of the investigation report, or the thoroughness of the investigation, even if that evidence was not before the Canadian Human Rights Commission when it made its decision: see, for example, *Pathak v. Canada (Canadian Human Rights Commission)*, [1995] 2 F.C. 455 (F.C.A.).

[107] It is also true that such an error could amount to a breach of procedural fairness, and that Mr. Nowoselsky's Notice of Application for Judicial Review alleges that the Canadian Human Rights Commission failed to observe the principles of procedural fairness in this case.

[108] That said, having reviewed the submissions made by Mr. Nowoselsky to the prothonotary, it is clear that no issue as to the fairness or thoroughness of the investigation was raised before her. In fact, in reply submissions, counsel for Mr. Nowoselsky described the investigation as "extensive". Moreover, there was no evidence before the prothonotary that the affidavits in question had even been provided to the investigator. As such, the prothonotary cannot be faulted for failing to consider this issue.

[109] As a consequence, I am not persuaded that the prothonotary based her decision on a wrong principle or a misapprehension of the facts in finding that these affidavits were not relevant to the issues on this application for judicial review, as those issues have been identified by Mr. Nowoselsky.

[110] The McDougall and Johnson affidavits were not filed in relation to the application for judicial review of the PSSRB decision, but were allegedly provided to the Commission investigator, although there was no evidence of this before the prothonotary. Each of the deponents states that Mr. Nowoselsky raised the issue of his disability with managerial personnel within the Correctional Service of Canada. The relevance of this evidence to the issues raised by Mr. Nowoselsky in his Notice of Application is not apparent, and once again, it appears that the evidence is really directed to collateral attack of the decision of the PSSRB adjudicator.

[111] Unlike the other affidavits sought to be relied on, the Payton affidavit was not provided to the Commission during the course of the investigation. Rather, Mr. Nowoselsky seeks to file this affidavit pursuant to the provisions of Rule 306.

[112] Like the McDougall and Johnson affidavits, Mr. Payton's affidavit states that Mr. Nowoselsky raised the issue of his disability with managerial personnel within the Correctional Service of Canada.

[113] Although Mr. Nowoselsky endeavoured to characterize this evidence as going to a jurisdictional question, the evidence really speaks to the alleged failure of CSC to accommodate Mr. Nowoselsky's disability. For the reasons given in relation to the other affidavit material, I am not persuaded that this evidence is relevant to the issues on this application for judicial review

[114] As a consequence, I am not persuaded that the prothonotary erred in dismissing Mr. Nowoselsky's request for an extension of time to file affidavits and other documentary material in support of his application for judicial review.

Conclusion

[115] For these reasons, this appeal is dismissed.

[116] The parties have consented to an order staying the scheduling order made by the prothonotary in her June 6, 2007 decision until such time as this appeal was finally disposed of. The matter is remitted to the case managers to fix a new schedule for the remaining steps in this matter.

[117] I will leave the matter of costs to be dealt with by the judge dealing with the merits of the application.

ORDER

THIS COURT ORDERS that:

1. The appeal is dismissed;

2. The file is referred back to the case-managers to fix a new schedule for the remaining steps in this matter; and

3. Costs shall be in the cause.

"Anne Mactavish"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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