Federal Court  Cour fédérale

DATE: 20100212

DOCKET: T2087-09

CITATION: 2010 FC 151

[ENGLISH TRANSLATION]

Québec City, Quebec, February 12, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ROBERT GRAVEL

Applicant

and

TELUS COMMUNICATIONS INC.

Respondent

REASONS FOR ORDER AND ORDER

[1] The Court is hearing a motion, filed by Telus Communications, Inc. (the moving party), to strike in whole or in part some affidavits submitted by Robert Gravel (the respondent) in support of an application for judicial review that he submitted against an labour arbitrator's decision to decline jurisdiction in a complaint of wrongful dismissal filed by the respondent.

THE CONTEXT

[2] The respondent lost his job with the moving party on November 12, 2007. He believes that he was unjustly dismissed. He filed a complaint against his dismissal, according to the procedure provided for in the *Canada Labour Code*, R.S.C. 1985, c. L-2.

[3] Meanwhile, the moving party made a preliminary objection, maintaining that the umpire did not have jurisdiction over the respondent's complaint, since he had not been dismissed, but made redundant following the elimination of his position. The umpire allowed this objection in a decision dated November 6, 2009, of which the respondent is seeking judicial review.

[4] The respondent filed several affidavits as evidence in support of this application. He wrote one of them; others were produced by Claude Gravel and Jacques Gagné. This motion is aimed at striking some paragraphs of the respondent's affidavit, as well the entirety of Claude Gravel's and Jacques Gagné's affidavits, or alternatively, some paragraphs of these affidavits.

APPLICABLE LAW

[5] Subsection 81(1) of the *Federal Courts Rules*, SOR/98-106 (the Rules) provides that there are only three exceptions to this principle. The first, set out in the same provision of the Rules, concerns motions and is not relevant in this case. The second concerns "However, it does not displace longstanding common law exceptions to the hearsay rule, nor the reliability and necessity exception of more recent vintage."

(*Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8 (CanLII), 2001 200 F.T.R. 94, at paragraph 13). The third flows from section 55 of the Rules, under which, "In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule." This provision may be applied to subsection 81(1), as the Federal Court of Appeal explains in *Canadian Tire*, above, at para 13.

[6] Apart from these exceptions, an affidavit must contain only facts; it is not an appropriate vehicle for legal arguments (see e.g. *Duyvenbode v. Canada (Attorney General)*, 2009 FCA 120 (CanLII) at para 3 and the judgments cited therein).

[7] However, at para 18 in *Canadian Tire*, above, the Federal Court of Appeal warns litigants that:

> motions to strike all or parts of affidavits are not to become routine (. . .) This is especially the case where the question is one of relevancy. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irrelevant will such motions be justified. In the case of motions to strike based on hearsay, the motion should only be brought where the hearsay goes to a controversial issue, where the hearsay can be clearly shown and where prejudice by leaving the matter for disposition at trial can be demonstrated.

Nevertheless, the "fact that both time and money would have to be spent dealing with these clearly irrelevant affidavits and that this will result in delays" could be considered a prejudice (*GlaxoSmithKline Inc. v. Apotex Inc.*, 2003 FC 920 (CanLII)), 27 C.P.R. (4th) 49, at para 7).

APPLICATION IN THIS CASE

Applicant's affidavit

[8] The moving party is requesting that paragraphs 31, 33, 36, 38, 66, 73, 74 and 78 of the respondent's affidavit be struck because the allegations they contain constitute hearsay, as the respondent has only quoted testimony made before the umpire.

[9] The respondent maintains that these paragraphs relate facts that arose in his presence and are aimed at remedying the absence of a transcript of the hearing before the umpire.

[10] The fact remains that these paragraphs in fact quote testimony made at the hearing before the umpire according to the respondent's understanding. Thus, this is clearly hearsay, and they must be struck.

[11] Moreover, I would add that accepting the submission of these statements to establish the veracity of their content would cause prejudice to the moving party, in effect obliging it to repeat the argument already made before the umpire. That would have the effect of transforming this judicial review of the umpire's decision into a *de novo* hearing, which would not only be costly, but would quite simply distort the nature of this proceeding. Thus, I am of the view that the tests set out by the Federal Court of Appeal in *Canadian Tire*, above, for striking parts of an affidavit based on hearsay have been met.

[12] The moving party is also requesting that the following passages be struck as they, it claims, only express the respondent's opinion about the knowledge and opinions of various persons.

i) At paragraph 15: some actions showing a lack of cooperation with the umpire and with himself [TRANSLATION] "were methods used in a systematic way by counsel (for the moving party), as if there was an attempt to conceal the actions and practices of the employer, or more precisely, of management".

ii) At paragraph 38: [TRANSLATION] "Therefore, Mr. Sarault has no idea what the [Sales Specialists] were doing".

iii) At paragraph 44: [TRANSLATION] "at the time that Mr. Sarault was considering firing me", and [TRANSLATION] "There is no doubt that this was a disguised dismissal and not a redundancy following a reorganization".

iv) At paragraph 76: the witnesses had to testify in front of Mr. Sarault, which [TRANSLATION] "made them feel uncomfortable, of course, if not intimidated".

[13] According to the respondent, these paragraphs only relate facts that arose or were related during the hearing. Once again, they are intended to make up for the lack of a transcript of the hearing.

[14] I concur with the moving party that these passages reflect the impressions of the respondent and express his opinion. They do not report facts of which he has personal knowledge and must be struck.

[15] The moving party is also asking that paragraphs 10 to 13, 16, 17, 19, 22, 63 and 64 be struck on the grounds that they contain argument instead of factual allegations.

[16] The respondent maintains that these paragraphs [TRANSLATION] "clarify only statements, facts, elements of the *Canada Labour Code* (. . .) and testimony" and help identify the issues of this application for judicial review.

[17] In these paragraphs, the respondent states his assessment of the evidence, submits legal arguments and exposes what he believes are errors committed by the umpire. In my view, his own characterization of it only confirms this. In accordance with the Federal Court of Appeal in *Duyvenbode*, above, these paragraphs are not appropriate in an affidavit and must be struck.

[18] The moving party also asks that paragraph 49 be struck, as it would introduce evidence that was not before the umpire and would thus be inadmissible in the framework of a judicial review. The respondent therein affirms having been warned of his imminent dismissal and having testified on the subject at the hearing.

[19] Insofar as the respondent testified about the facts that he quotes at paragraph 49, this is not new evidence. In the absence of the award in the record, it is impossible to say whether this is the case. This question should thus be left to the trial judge to assess.

[20] Finally, the moving party seeks to have paragraphs 59 and 60 struck because they report confidential exchanges among his counsel and the respondent that arose in the framework of an attempt to settle the case. This evidence would therefore be inadmissible.

[21] The respondent retorts that these are facts that [TRANSLATION] "reflect negatively on counsel for the respondent" and establish contradictions in the positions adopted by it. These facts are very important for the trial judge to be able to comment on whether the award is reasonable.

[22] It is evident that these confidential exchanges among counsel for the moving party and the respondent are not admissible as evidence. Consequently, paragraphs 59 and 60 are struck.

Affidavits of Claude Gravel and Jacques Gagné

[23] The moving party maintains that Claude Gravel's and Jacques Gagné's affidavits must be struck in their entirety. As they are not interested parties to this application for judicial review, Mr. Gravel and Mr. Gagné would not be fit to testify as affiants. In addition, their affidavits would only constitute hearsay as they have no personal

knowledge of the facts that are related therein. To allow this irrelevant and superfluous evidence would result in this dispute being transformed into a *de novo* hearing on the complaint of wrongful dismissal, which goes against the nature of a judicial review.

[24] According to the respondent, these affidavits are necessary in order to understand the progress of the arbitration and to remedy the lack of a transcript of the hearing before the umpire. They would be reliable since Mr. Gravel and Mr. Gagné attended and participated at the hearing and since they are credible witnesses with significant business experience and are prepared to give testimony under oath.

[25] Although I understand the reasons that, in the eyes of the respondent, justify their submission, Mr. Gravel's and Mr. Gagné's affidavits cannot be allowed. In fact, they constitute hearsay in large part, as they quote statements made at the hearing before the umpire according to their own understanding, and argument, in that they express their personal opinion about the conduct of the trial, evidence submitted before the umpire, the umpire's behaviour, as well as the behaviour of counsel for the moving party. In addition, I note that they only quote acts already quoted in the respondent's affidavit, in the exact same manner. Thus, these affidavits do not help the respondent shore up his argument, nor rebut that of the moving party. That being the case, it is my view that *GlaxoSmithKline*, above, is applicable in this case: The moving party would be prejudiced if it had to devote time and energy to reviewing affidavits based on hearsay and that have minimal relevance. Thus, these affidavits must be struck in their entirety.

CONCLUSION

[26] For these reasons the motion to strike is allowed, except as regards paragraph 49 of the respondent's affidavit. Paragraphs 10 to 13, 15 to 17, 19, 20, 22, 31, 33, 36, 38, 59, 60, 63, 64, 66, 73, 74 and 78 of the respondent's affidavit, as well as the sentences in paragraphs 44 and 76 cited above, are struck. Claude Gravel's and Jacques Gagné's affidavits are struck in their entirety. Without costs.

ORDER

THE COURT ORDERS that: the motion to strike is allowed, except as concerns paragraph 49 of the respondent's affidavit. Paragraphs 10 to 13, 15, 16, 17, 19, 20, 22, 31, 36, 38, 59, 60, 63, 64, 66, 73, 74 and 78, as well as the sentences in paragraphs 44 and 76 cited above, are struck. The affidavits of Claude Gravel and Jacques Gagné are struck in their entirety. Without costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2087-09
STYLE OF CAUSE:	ROBERT GRAVEL v. TELUS COMMUNICATIONS INC.
PLACE OF HEARING:	Québec City, Quebec
DATE OF HEARING:	February 11, 2010
REASONS FOR ORDER:	TREMBLAY-LAMER J.
DATED:	February 12, 2010

APPEARANCES:

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