Federal Court  Cour fédérale

Date: 20130412

Docket: T-281-12

Citation: 2013 FC 374

Ottawa, Ontario, April 12, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

DANNY PALMER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The applicant asks this Court to set aside the decision of an adjudicator of the Public Service Labour Relations Board (PSLRB) dated January 5, 2012, in which the adjudicator held that she was without jurisdiction to deal with the applicant's grievance.

Factual background

[2] Mr. Danny Palmer (the applicant) was an intelligence officer with the Canadian Security Intelligence Service (CSIS) since 1991. He was dismissed on June 18, 2003, effective July 2, 2003, on grounds of poor performance (Applicant's Record, Affidavit of Danny Palmer, para 18). The applicant held a Top Secret security clearance for the duration of his employment. Upon termination, the applicant's Top Secret security clearance was cancelled.

[3] The applicant filed a grievance of his termination, which was dismissed by the Director of CSIS on August 5, 2003. The applicant was advised by the CSIS Employee Association that he could submit a supplemental grievance, which he did in March 2004. CSIS objected to the referral of this supplemental grievance for adjudication because it had been presented beyond the time limits and was not a recognized procedure in CSIS's policy (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 2). The applicant's grievance essentially claimed that his termination was not for performance reasons, but was an arbitrary disciplinary discharge done in bad faith. A hearing with the PSLRB was held on February 1, 2006. PSLRB adjudicator Tarte decided that the applicant should be entitled to present his supplemental grievance since he had received erroneous advice from the CSIS Employee Association and he had diligently pursued his claim (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 6).

[4] A hearing on the merits of the grievance commenced on September 25, 2006 (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 4). At this time, the applicant represented himself. He was granted a Secret level clearance for purposes of adjudication only (Respondent's Record, Vol 2, Tab 44). During the hearing, CSIS presented witnesses. The applicant claimed to need access

to Top Secret documents to cross-examine some of the witnesses (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 4). The hearing was therefore adjourned.

[5] In November 2006, the applicant retained counsel, Mr. Duggan (Respondent's Record, Vol 2, Tab 40). On December 1, 2006, counsel for CSIS, Mr. Roussy, advised the PSLRB that CSIS was not willing to provide the applicant with a Top Secret clearance, but would provide his counsel with the necessary forms to apply for a Top Secret clearance (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 7). The applicant's counsel was granted a Top Secret security clearance in the spring of 2007 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 20).

[6] On June 14, 2007, the PSLRB ordered CSIS to disclose all documents the applicant thought were relevant to his case, in accordance with security considerations (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 11).

[7] On August 31, 2007, Mr. Kirk, counsel for CSIS, indicated that a final determination had been made by CSIS and that the applicant would not be granted Top Secret security clearance (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 4). The same letter indicated that pursuant to the PSLRB's order from June 14, 2007, documents were now available for the applicant and his counsel to view at CSIS's office in Montreal. Documents classified up to Secret could be viewed by both, while only the applicant's counsel would be allowed to view documents classified Top Secret.

[8] The hearing on the merits of the grievance was set to begin on October 24, 2007. The parties entered in mediation on October 24, 2007. At the beginning of mediation, Mr. Kirk, counsel for CSIS, allegedly advised that since the applicant's Top Secret security clearance had been denied, the adjudicator could not re-instate him within CSIS. A settlement agreement was reached on October 25, 2007 (Respondent's Record, Vol 2, Tab 38). The agreement provided that the applicant would withdraw his grievance, which he did on December 13, 2007 (Respondent's Record, Vol 2, Tab 58). The applicant was represented by his counsel, Mr. Duggan, throughout the mediation and settlement.

[9] The applicant claims to have signed the settlement based on his belief that he could not be reinstated because of the denial of his Top Secret security clearance. The applicant claims that after signing the settlement agreement, his counsel, Mr. Duggan, showed him a list of documents that he had received before the hearing set for October 24, 2007. The applicant was of the view that some documents were incorrectly classified as Top Secret (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 8).

[10] The applicant retained his current counsel, Mr. Mercure and Ms. Stanners, for the purpose of obtaining information on the process CSIS followed to deny him Top Secret clearance and to find out why documents he had authored had been classified Top Secret. The applicant's counsel sent letters to CSIS on October 2, 2008 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 12), December 17, 2008 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 13) and March 19, 2009 (Applicant's Record, Affidavit of Danny Palmer, Tab 3,

Appendix 14), asking what policy or procedure led to the denial of the applicant's Top Secret security clearance.

[11] CSIS responded to the applicant's counsel's letters on November 5, 2008 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 15), February 16, 2009 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 16) and April 17, 2009 (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 17), indicating that:

a. CSIS would not be giving any further consideration to the applicant's application for employment within CSIS;

b. the applicant's Secret security clearance, which was granted for the sole purpose of adjudication, was deactivated in 2007, following the settlement of the PSLRB adjudication;

c. it is CSIS policy to deactivate an employee's clearance when he or she leaves CSIS;

d. the granting of the applicant's Secret clearance and his counsel's Top Secret clearance was done in accordance with internal CSIS policy HUM-504-1 and Government Security Policy, as set out by the Treasury Board Secretariat;

e. there were no impediments to considering the applicant for a Top Secret clearance in the future if another government department or agency requested it;

f. an investigation was conducted prior to the decision to deny the applicant a Top Secret clearance for the purpose of the hearing; and

g. less than 5% of the documents disclosed for the 2007 hearing were classified Top Secret, and therefore only available to Mr. Duggan.

[12] On June 5, 2009, the applicant filed a request with the PSLRB asking it to reopen his case on the basis that the 2007 settlement was entered into as a result of fraud and coercion (Respondent's Record, Vol 2, Tab 37). According to the applicant, CSIS had no reason to deny him a Top Secret security clearance, and thus no reason to prevent full disclosure of the evidence in the

hearing of his grievance. In a letter dated June 30, 2009, CSIS objected to the PSLRB's jurisdiction to revive the applicant's grievance, which had been withdrawn in December 2007 pursuant to the settlement agreement (Respondent's Record, Vol 1, Tab 33).

[13] A preliminary decision of the PSLRB examined the question of its jurisdiction. In a decision dated January 25, 2010, an adjudicator held that the PSLRB had the jurisdiction to determine whether the settlement reached by the parties in October 2007 was valid and binding. Therefore, the matter was referred to another adjudicator for a hearing and decision (Respondent's Record, Vol 2, Tab 37).

[14] The applicant claims he and his counsel became aware of the existence of Exhibits 2, 56 and 57 in March 2011. Exhibits 2, 56 and 57 are Briefing Notes recommending the denial of the applicant's Top Secret security clearance. They are dated May 4, 2007, October 22, 2010 and July 5, 2011, respectively. The applicant's current counsel, who has Top Secret clearance, was given access to view these exhibits on March 15, 2011.

[15] The hearing before the adjudicator on the issue of whether the settlement reached by the parties in October 2007 was valid and binding took place from March 21 to 23, 2011 and September 19 to 21, 2011 (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, p 2). According to the applicant, the adjudicator stated at the beginning of the hearing that she did not see the need to hold a hearing since the applicant had agreed to settle the matter while represented by counsel.

[16] The applicant was shown Exhibits 2, 56 and 57 during the hearing. He claims that their content is not of a Top Secret nature and that the exhibits were only classified as such in order to make them unavailable to him (Applicant's Record, Affidavit of Danny Palmer, Tab 3, p 3). According to the applicant, he learned by seeing exhibits 2, 56 and 57 that CSIS would have denied his Top Secret clearance based on unfounded allegations without notifying him, and that CSIS's affirmation that there would be no impediment to considering a Top Secret application in the future was misleading (Affidavit of Danny Palmer, Tab 3, para 109, pp 12-13). According to the applicant, allegations of his carelessness and irresponsibility with regard to the handling of classified information formed the basis of the briefs recommending that his Top Secret clearance be denied (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 5). The applicant claims that neither he nor his counsel knew about these allegations when signing the settlement agreement. The applicant also claims that he had addressed the allegations raised in these exhibits as far back as October 23, 2005 (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 12).

[17] During the hearing, the adjudicator heard seven (7) witnesses, including the applicant, and considered sixty-six (66) exhibits (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, pp 3-6). Before the adjudicator, the applicant submitted that he was misled by being told that his Top Secret security clearance would not be reinstated if his grievance was successfully adjudicated, which allegedly left him with no choice but to settle since he was unable to access all the information needed for his case. The applicant claimed that he obtained information in 2008 and 2009 leading him to conclude that the 2007 settlement was entered into because of fraud and coercion on the part of CSIS – particularly, that the denial of his Top Secret security clearance was a ruse to prevent full disclosure of all documents relevant to his grievance. According to the applicant,

the denial of his Top Secret security clearance was limited to the arbitration process and did not affect future employment with CSIS.

[18] The respondent's affiant summarized the testimonies of certain witnesses at the hearing as follows: Mr. Ken Brothers, Chief of Physical Security in 2006, testified that he reminded the applicant of his obligations in terms of security upon his release from CSIS. He also indicated that he reviewed documents submitted by the applicant after his release and determined that some of these documents contained classified information (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, p 6).

[19] Mr. Gordon Kirk, Legal Counsel with the Department of Justice, testified that a hearing on the merits of the applicant's case was scheduled for the week of October 29, 2007, and that an order of disclosure had been made by the PSLRB. He indicated that no complaints had been made regarding disclosure after the order was made. Mr. Kirk testified that documents were made available to the applicant and his counsel for consultation at CSIS's office in Montreal. He also provided an overview of what transpired during mediation (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, pp 6-7).

[20] Mr. David Vigneault, Former Assistant Director, Secretariat, and Assistant Director, Intelligence with CSIS, provided context for a letter he wrote to the applicant's counsel on November 5, 2008 (Respondent's Record, Vol 1, Tab 27), in response to a letter from the applicant's counsel dated October 2, 2008 (Respondent's Record, Vol 1, Tab 26). He indicated that should a government department request a Top Secret clearance for the applicant, the decision to

grant that clearance would be at the discretion of the Deputy Head of the requesting department (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, pp 7-8).

[21] Finally, Ms. Rachel Grandmaison, Head, Contractor Security, provided information on internal policies applying to personnel security and contractors. She explained that after the applicant was dismissed, his Top Secret clearance was deactivated. It was reactivated and downgraded to Secret in 2006 for the sole purpose of adjudication. Ms. Grandmaison explained that the applicant was not interviewed because his information was already on file from his last security update. Since Secret clearances are valid for ten (10) years, the applicant's was still valid. Ms. Grandmaison indicated that the applicant's Top Secret clearance was refused because he had breached security policy. According to the applicant, Ms. Grandmaison testified that no similar case to his had arisen before (Respondent's Record, Vol 1, Affidavit of Tiffanie Jennings, pp 8-9).

[22] The adjudicator rendered her decision on January 5, 2012.

[23] All sixty-six (66) exhibits which were submitted to the adjudicator were attached as Exhibit B to Tiffanie Jennings's affidavit before this Court. Four (4) were included in a confidential volume provided under separate cover (Exhibits 2, 56 and 57: the three (3) Briefing Notes with attachments, and Exhibit 3: the applicant's supplemental grievance).

Decision under review

[24] The adjudicator held that all the facts raised by the applicant, in support of his request for reviewing the conditions which led to the settlement agreement, were known to him and his counsel at the time of the mediation and when they agreed to settle.

[25] The adjudicator concluded that she was not persuaded by the correspondence between the applicant's counsel and CSIS, between July 31, 2008 and May 19, 2009. She held that the correspondence was irrelevant to the issue of whether the settlement is valid and binding.

[26] The adjudicator took note of the fact that the applicant's former counsel, Mr. Duggan, had raised the issue of CSIS denying the applicant a Top Secret security clearance during the initial hearing, as well as CSIS's refusal to disclose certain documents. The adjudicator observed that a settlement was reached despite these issues being outstanding.

[27] The adjudicator held that, based on the evidence before her, she was not convinced that the applicant had been misled, or that his consent to settle was obtained through misrepresentations, fraud, or coercion on the part of CSIS. She concluded that the settlement was a mutual intention of both competent parties who wished to resolve the issue with finality, and was therefore binding. The settlement being binding, so was the withdrawal of the grievance, which led her to conclude that she did not have jurisdiction to deal with the applicant's grievance (citing *Canada (Attorney General) v Lebreux*, (FCA), [1994] FCJ no 1711 (QL) at para 12, 178 NR 1).

Issues

[28] The Court is of the view that this case raises the following issues:

a. Did the adjudicator breach principles of procedural fairness?

b. Was the adjudicator's decision that the settlement agreement is valid and binding reasonable?

Legislative provisions

[29] The applicable legislative provisions are set out in annex to this judgment. The PSLRB and its adjudicators are under the scope of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*]. As a general remark, it is relevant to note that CSIS is considered a Separate Agency pursuant to Schedule V of the *Financial Administration Act*, RSC 1985, c F-11. Pursuant to section 8 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, CSIS's Director has exclusive authority to appoint employees, provide the terms and conditions of their employment, and exercise the powers and functions of the Treasury Board relating to human resources management under the *Financial Administration Act*, as well as those assigned to the Public Service Commission by the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13. The *PSLRA* does not generally govern labour relations within CSIS, except for its Part 2 which relates to grievances, (subsection 2(1) of the *PSLRA*, definition of "employee").

Standard of review

[30] Issues of procedural fairness require no deference on the part of the Court. The question the Court must ask itself is whether the adjudicator's approach met the level of fairness required (*Canada (Attorney General) v Timson*, 2012 FC 719, [2012] FCJ No 895 (QL) [*Timson*]; *Canadian*

Union of Public Employees (CUPE) v Ontario (Minister of Labour), 2003 SCC 29 at para 100, [2003] 1 SCR 539; *Canada (Attorney General) v Grover*, 2004 FC 704 at para 34, [2004] FCJ No 865 (QL); *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[31] The parties agree that the standard of review as it pertains to the adjudicator's decision on the validity of the settlement, is reviewable on a standard of reasonableness. While the present case is a matter of deciding whether or not the adjudicator has jurisdiction to reopen the applicant's grievance, the true question is one of facts – specifically, a factual determination of whether the settlement agreement was entered into under fraud or misleading information from CSIS (*Lindsay v Canada (Attorney General)*, 2010 FC 389 at para 38, 369 FTR 64). Being mainly a question of fact, and mixed fact and law, the Court is to show deference to the adjudicator's conclusion (*Robillard v Canada (Attorney General)*, 2008 FC 510 at para 23, 330 FTR 31; *Canada (Attorney General) v Pepper*, 2010 FC 226 at para 20, 364 FTR 238; *Canada (Attorney General) v Robitaille*, 2011 FC 1218 at para 23, [2011] FCJ No 1494 (QL)). This is particularly so given the strong privative clause contained in section 233 of the *PSLRA*. The Court will therefore examine the "justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Arguments

Applicant's arguments

[32] The applicant claims that the adjudicator erred by failing to provide adequate reasons for her decision. According to the applicant, the adjudicator merely reiterated his submissions and stated a conclusion. The applicant submits that the adjudicator failed to address the evidence regarding allegations of bad faith and the evidence regarding concealment from the applicant and his counsel of the methods used to deny him a Top Secret security clearance. The applicant claims that nothing in the denial brief (Exhibit 2) warranted a Top Secret classification, and that the adjudicator erred by not considering this. The applicant claims that because his case raises an issue of bad faith, the adjudicator had to scrutinize CSIS's discretion in classifying these documents.

[33] The applicant also argues that the adjudicator had a duty to assess the credibility of witnesses and the reliability of the evidence. The applicant claims that issues of contradictions, retractions, inconsistencies and bias were raised in CSIS's evidence, and in such a case, adequate reasons should have commented on the credibility of witnesses and reliability of the evidence.

[34] The applicant also takes issue with the fact that the adjudicator would have indicated on two (2) separate occasions that she did not see the reason for holding the hearing. The applicant claims that this led to a reasonable apprehension of bias.

[35] The applicant also alleges that the adjudicator stated conclusions that were unsupported and contradicted by the evidence. Namely, the applicant claims that while it was true for the adjudicator to state that the applicant knew he was being denied his Top Secret security clearance when he signed the settlement agreement, he was not aware of the process used by CSIS to deny him clearance. Furthermore, the applicant argues that Exhibit 2 had not been disclosed to either himself

or his counsel at the time of the settlement, but only became known to himself and his counsel three (3) years after the settlement. The applicant claims that he could not have known that evidence had been reclassified and "placed" out of his reach, that CSIS had relied on allegations of wrongdoing on his part to deny him the Top Secret security clearance, and that the denial of his Top Secret security clearance was solely for administrative purposes. He further argues that his supplemental grievance (Exhibit 3) was reclassified without notice to him and was used to deny him Top Secret security clearance. Finally, the applicant argues that it is illogical for CSIS to grant him Secret clearance while elsewhere describing him as "careless and irresponsible with classified information". According to the applicant, the adjudicator addressed none of this evidence.

[36] The applicant also argues that the adjudicator rendered a cursory decision after the end of her mandate. He cites paragraph 22(4) of the *Public Service Labour Relations Act* which indicates that a person who ceases to be a member of the Board has eight (8) weeks to complete his or her responsibilities. The applicant argues that the timing of the adjudicator's decision combined with its cursory findings corroborate the argument that she disregarded evidence on key issues. According to the applicant, this raises a reasonable apprehension of bias.

[37] Finally, the applicant takes issue with the adjudicator's refusal to consider the unedited version of the settlement agreement. The applicant argues that, by refusing to do so, the adjudicator would have believed he received an important settlement, and would have pre-judged the matter.

Respondent's arguments

[38] The respondent first recalls that the adequacy of reasons is not a stand-alone basis for quashing a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses*]). The respondent also indicates that the adjudicator did not have to address all the details pertaining to the evidence, and points out that "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses*, above, at para 16). The respondent argues that, in this case, the adjudicator's decision clearly outlines her reasoning. According to the respondent, although the adjudicator did not explicitly mention all sixty-six (66) exhibits, her reasons clearly show that she considered the evidence before her as a whole. The respondent argues that reasons should not be found inadequate simply because they could have been more comprehensive (citing *Schaper v Beauchamp*, 2011 BCSC 833 at para 79, [2011] BCJ No 1188 (QL)).

[39] With respect to the credibility of the witnesses, the respondent argues that there is no absolute rule requiring adjudicators to give reasons in all circumstances, and therefore, no obligation for the adjudicator to verbalize her assessment of the credibility of the witnesses.

[40] The respondent submits that there is no evidence that the adjudicator stated that she did not see a reason for holding the hearing. The respondent argues that such allegations in the applicant's affidavit do not constitute evidence and do not inform on the context in which such a statement would have been made. The respondent also submits that any apprehension of bias should have

been raised during the hearing and before the adjudicator. Because this issue was not raised at the hearing, neither the respondent nor the adjudicator had the opportunity to address it.

[41] The respondent also submits that, contrary to the applicant's contentions, the adjudicator's conclusions are supported by the evidence on record. According to the respondent, the evidence presented during the hearing clearly showed that both the applicant and his counsel were aware of all the conditions when they signed the settlement agreement, and that the adjudicator's decision is therefore reasonable.

[42] Finally, the respondent argues that the applicant omits the context in which the adjudicator decided not to take into account the unedited version of the settlement agreement. The respondent claims that during the cross-examination of the applicant at the hearing, counsel for the respondent asked questions about the alleged invalidity of the settlement. The applicant's counsel allegedly objected to questions pertaining to what transpired during the mediation session which led to the settlement agreement. The adjudicator ruled in favour of the applicant, concluding that questions should not concern the content of the mediation; therefore, the respondent filed a redacted version of the settlement agreement (Respondent's Record, Vol 2, Tab 38). The respondent claims that the applicant wanted to introduce an un-redacted version of the settlement agreement on the last day of the hearing, after the last witness had testified. According to the respondent, the adjudicator decided that since the evidence was closed, and given her ruling on the applicant's previous objection, she would not allow the introduction of the un-redacted settlement agreement. The respondent claims that the adjudicator was correct in refusing to allow the introduction of the full text of the settlement

since its content was never disputed and it was irrelevant to the determination of whether or not it was valid and binding.

Analysis

[43] The question before the adjudicator was limited to whether or not the applicant and his employer had entered into a valid and binding settlement. The adjudicator essentially found that, since all elements were known to the applicant when he signed the settlement agreement, it was valid and binding.

Procedural fairness

[44] The applicant raised several issues pertaining to procedural fairness. One of the applicant's arguments concerned the adequacy of the adjudicator's reasons for her decision. The respondent correctly noted that sufficiency of reasons is not a stand-alone reason for quashing a decision. The Court recalls the Supreme Court of Canada's comments in *Newfoundland and Labrador Nurses*, above, where it is stated that the assessment of the reasons should be part of the organic exercise of determining whether the decision is reasonable. This is not a case where no reasons were provided when they were required, thus breaching procedural fairness – reasons were provided by the adjudicator, and should therefore be assessed when examining whether the decision is reasonable (*Newfoundland and Labrador Nurses*, above at para 22).

[45] The applicant also raised the issue of the adjudicator apparently stating on two (2) separate occasions that she did not see the need to hold the hearing. The Court notes that since there is no transcript of the hearing, nor the pre-hearing conference, there is no evidence in the record showing

that the adjudicator made such remarks, nor the context in which such remarks would have been made. The test for reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394: "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude". The applicant has led no independent evidence to support this allegation of bias. As indicated by this Court in *Armstrong v Canada (Attorney General)*, 2006 FC 505 at para 74, 291 FTR 49, "[t]he threshold for establishing a claim of reasonable apprehension of bias is high and substantial grounds are necessary to support such a claim". This high threshold could be displaced with cogent evidence, which has not been done here. The Court finds that there is no merit to the serious allegation that the adjudicator was biased or had pre-judged the matter.

[46] Also, it is worthy of note that the applicant did not raise the issue of bias immediately at the hearing, or at the pre-hearing conference, when the adjudicator allegedly made the impugned comments. It is trite law that a reasonable apprehension of bias must be raised at the earliest practicable opportunity (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 983 at paras 16-18, [2008] FCJ No 1219 (QL), citing *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577; *Zündel v Canada (Canadian Human Rights Commission) (re Canadian Jewish Congress)* (2000), 195 DLR (4th) 399, 264 NR 174 (FCA)). The applicant was represented by counsel, and the significance of such comments would have been immediately apparent to the applicant and his counsel.

[47] The applicant also claimed that a reasonable apprehension of bias arose because the adjudicator's decision was rendered shortly after the end of her term with the PSLRB. The applicant

has not adduced evidence indicating that the adjudicator would have had an interest in rendering a hasty or inadequate decision. The Court cannot agree with the applicant's contention that the adjudicator's decision was "unmotivated" and "in complete disregard for the evidence on the key issues". To the contrary, the adjudicator's decision is motivated and does address the key issue of the applicant being misinformed by CSIS before signing the settlement agreement (paragraphs 8 and 9 of her decision). Once again, without evidence to support the applicant's claim, an informed person viewing this matter practically and realistically, having thought the matter through, would not conclude to a reasonable apprehension of bias. The high threshold for such a serious allegation is simply not met.

[48] The applicant also alleged that the adjudicator breached procedural fairness by refusing to consider the entire text of the settlement agreement. The Court agrees with the respondent that the content of the settlement itself was never in question and was irrelevant to the issue before the adjudicator, which was narrowly circumscribed to determining whether the applicant was misled into agreeing to settle, or if CSIS acted fraudulently or in bad faith. None of the applicant's allegations targeted the content of the settlement agreement. The applicant also objected to the content of the mediation and agreement being scrutinized during the hearing before the adjudicator. Therefore, the adjudicator, being the master of her own proceedings, did not err by refusing to admit an un-redacted copy of the settlement agreement into evidence given the applicant's objections, the fact that the substance of the settlement was not disputed and was of little relevance to the determination of whether or not the applicant was misled into settling.

Reasonableness of the adjudicator's decision

[49] The adjudicator's reasons allow this Court to "understand why the [adjudicator] made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses*, above, at para 16). Indeed, it is clear from the adjudicator's reasons that she concluded that the settlement was binding because the applicant and his counsel were aware of all the facts raised in support of reviewing the conditions which led to the settlement. Although she does not list all such facts, she is not required to (*Newfoundland and Labrador Nurses*, above, at para 16). The adjudicator noted that the applicant's counsel had raised the issue of the refusal of his Top Secret security clearance, as well as CSIS's refusal to disclose certain documents, yet still agreed to a settlement despite these issues being outstanding (paragraph 9 of the adjudicator's decision).

[50] The adjudicator's reasons address the heart of the applicant's arguments, which is that he was not aware of certain relevant facts before agreeing to settle, formulated as follows before this Court: that evidence had been reclassified, that CSIS relied on allegations of wrongdoing on his part to deny him Top Secret security clearance, and that the denial of his Top Secret security clearance was for administrative purposes (Applicant's Record, Memorandum of Fact and Law, Tab 5, p 23). According to the adjudicator, it was clear that the applicant was aware of all these facts when he chose to settle. An examination of the record confirms that this conclusion was certainly one of the possible outcomes justifiable by the facts of this case.

[51] The Court notes that, on October 11, 2007, the applicant raised concerns with disclosure of documents from CSIS after the June 2007 order of disclosure from the PSLRB (Respondent's

Record, Vol 1, Tab 22). The alleged issues with respect to disclosure could have been heard at the hearing. However, and despite the order of disclosure, the applicant and his counsel nonetheless agreed to a settlement agreement.

[52] While the applicant claims not to have been aware of the allegations against him contained in Exhibits 2, 56 and 57, the Court notes that these allegations were referred to on numerous occasions, many of which were prior to the applicant signing the settlement agreement. For instance, letters addressed to the PSLRB contained references to the applicant's carelessness in dealing with classified information (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 18, dated October 11, 2005, p 3; Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 19, dated November 2, 2005).

[53] Furthermore, the Court notes that in a letter drafted by the applicant and sent to the PSLRB in March 2006, the applicant clearly expresses his knowledge that CSIS believes that he had shown a disregard to the *Security of Information Act*, RSC 1985, c O-5, and the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, by sending classified documents by fax (Respondent's Record, Vol 2, Tab 39, pp 174 and 177). The same letter indicates that the applicant was aware that this was the reason why his Top Secret security clearance would not be reinstated. In another letter authored by the applicant, dated November 15, 2006, and addressed to the PSLRB, the applicant clearly set out that he was aware of CSIS's concerns with classified information he disclosed to the PSLRB (Respondent' Record, Vol 2, Tab 40, p 183). This correspondence emanating from the applicant pre-dates the settlement agreement. It is therefore farfetched for the applicant to now

claim that he did not know why his Top Secret security clearance was denied, and that this lack of knowledge would render the settlement agreement invalid.

[54] The applicant claims he was misled by being told that reinstatement with CSIS would be impossible. Given CSIS's refusal of the applicant's Top Secret security clearance, the Court is not convinced that this statement, if it was indeed made at the beginning of negotiations, would have been misleading at the time. What the CSIS's November 5, 2008 letter indicated is that there would be no impediments to considering the applicant for a Top Secret security clearance in the future, should another government agency require it for employment purposes. Indeed, CSIS will perform a security clearance for its own employees, but CSIS is also responsible for security clearance for all Departments in government, leaving the final decision, in that case, to the Deputy Head of the Department. However, the letter stressed that, in the absence of such request, the investigation will not be triggered. (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 15). The applicant himself recognized that a Top Secret security clearance is a prerequisite for employment with CSIS (Respondent's Record, Vol 2, Tab 40, pp 182-183). It was therefore open to the adjudicator to conclude that CSIS did not mislead the applicant.

[55] At hearing before this Court, the applicant also alleged that the letter, dated October 30, 2009, contradicted what was said to the applicant at mediation. In that letter, Mr. Kirk indicated that CSIS provided the applicant with a Secret security clearance (Not Top Secret security clearance) strictly for the purposes of adjudication before the PSLRB. The said letter indicated that if the applicant's complaint had proceeded to a hearing and decision, the adjudicator could have reinstated the applicant. In this event, CSIS would have conducted a security clearance investigation of the

applicant. If a Top Secret security clearance had been denied, then the applicant could have filed a complaint with the Security Intelligence Review Committee. According to the applicant, the contents of this letter contradicted what was said during the mediation leading to the settlement. (Applicant's Record, Affidavit of Danny Palmer, Tab 3, Appendix 20).

[56] However, there is no evidence of the content of the evidence during mediation. Furthermore, the letter merely states that it cannot be confirmed in advance that a Top Secret security clearance will be granted. Perhaps this issue raised by the applicant at hearing could have been raised at hearing before the adjudicator, but the applicant, represented by counsel, decided to settle instead.

[57] The Court recalls that the adjudicator's reasons need not include all details and arguments (*Newfoundland and Labrador Nurses*, above at para 16). This does not impugn the reasonableness of the adjudicator's decision, particularly since credibility of witnesses or authenticity of documents was not at issue, and because the record before the adjudicator supports her findings.

[58] There is no evidence in the record before this Court supporting the conclusion that CSIS would have misled the applicant or coerced him into signing the settlement agreement. Having reasonably concluded that the settlement agreement was valid and binding, including the withdrawal of the grievance, the adjudicator was correct in subsequently concluding that she did not have jurisdiction to examine the applicant's grievance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Richard Boivin"

Judge

Annex

The following provisions of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 are relevant to the case at bar:

INTERPRETATION	DÉFINITIONS ET INTERPRÉTATION
Definitions	Définitions
2. (1) The following definitions apply in this Act.	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
"*employee*" « fonctionnaire »	« fonctionnaire » "*employee*"
"*employee*", except in Part 2, means a person employed in the public service, other than	«fonctionnaire» Sauf à la partie 2, personne employée dans la fonction publique, à l'exclusion de toute personne:
…	[…]
(*e*) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;	*e*) employée par le Service canadien du renseignement de sécurité et n'exerçant pas des fonctions de commis ou de secrétaire;
…	[…]
PART 2	PARTIE 2
GRIEVANCES	GRIEFS
…	[…]
INDIVIDUAL GRIEVANCES	GRIEFS INDIVIDUELS
…	[…]
Reference to Adjudication	*Renvoi à l'arbitrage*
Reference to adjudication	Renvoi d'un grief à l'arbitrage

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(*c*) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(*d*) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

…

ADJUDICATION

…

Decision of Adjudicator

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

[…]

ARBITRAGE

[…]

Décision de l'arbitre de grief

…	[…]
Decisions not to be reviewed by court	Caractère définitif des décisions
233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.	**233.** (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.
No review by *certiorari*, etc.	Interdiction de recours extraordinaires
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

The following section of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 is relevant to the present application:

PART I	PARTIE I
CANADIAN SECURITY INTELLIGENCE SERVICE	SERVICE CANADIEN DU RENSEIGNEMENT DE SÉCURITÉ
…	[…]
MANAGEMENT OF SERVICE	GESTION
…	[…]
Powers and functions of Director	Attributions du directeur
8. (1) Notwithstanding the *Financial Administration Act* and the *Public Service Employment Act*, the Director has exclusive authority to appoint employees and, in relation to the human resources management of employees, other than persons attached or seconded to the Service as employees,	**8.** (1) Par dérogation à la *Loi sur la gestion des finances publiques* et à la *Loi sur l'emploi dans la fonction publique*, le directeur a le pouvoir exclusif de nommer les employés et, en matière de gestion des ressources humaines du Service, à l'exception des personnes affectées au Service ou détachées auprès de lui à titre d'employé:

(*a*) to provide for the terms and conditions of their employment; and

a) de déterminer leurs conditions d'emploi;

(*b*) subject to the regulations,

b) sous réserve des règlements:

(i) to exercise the powers and perform the functions of the Treasury Board relating to human resources management under the *Financial Administration Act*, and

(i) d'exercer les attributions conférées au Conseil du Trésor en vertu de la *Loi sur la gestion des finances publiques* en cette matière,

(ii) to exercise the powers and perform the functions assigned to the Public Service Commission by or pursuant to the *Public Service Employment Act*.

(ii) d'exercer les attributions conférées à la Commission de la fonction publique sous le régime de la *Loi sur l'emploi dans la fonction publique*.

Discipline and grievances of employees

Conduite des employés et griefs

(2) Notwithstanding the *Public Service Labour Relations Act* but subject to subsection (3) and the regulations, the Director may establish procedures respecting the conduct and discipline of, and the presentation, consideration and adjudication of grievances in relation to, employees, other than persons attached or seconded to the Service as employees.

(2) Par dérogation à la *Loi sur les relations de travail dans la fonction publique* mais sous réserve du paragraphe (3) et des règlements, le directeur peut établir des règles de procédure concernant la conduite et la discipline des employés, à l'exception des personnes affectées au Service ou détachées auprès de lui à titre d'employé, la présentation par les employés de leurs griefs, l'étude de ces griefs et leur renvoi à l'arbitrage.

Adjudication of employee grievances

Arbitrage

(3) When a grievance is referred to adjudication, the adjudication shall not be heard or determined by any person, other than a full-time member of the Public Service Labour Relations Board established under section 12 of the *Public Service Labour Relations Act*.

(3) Les griefs renvoyés à l'arbitrage ne peuvent être entendus et tranchés que par un membre à temps plein de la Commission des relations de travail dans la fonction publique constituée par l'article 12 de la *Loi sur les relations de travail dans la fonction publique*.

Regulations

Règlements

(4) The Governor in Council may make regulations

(4) Le gouverneur en conseil peut prendre des règlements:

(*a*) governing the exercise of the powers and the performance of the duties and functions

a) pour régir l'exercice par le directeur des pouvoirs et fonctions que lui confère le

of the Director referred to in subsection (1); and	paragraphe (1);
(*b*) in relation to employees to whom subsection (2) applies, governing their conduct and discipline and the presentation, consideration and adjudication of grievances.	*b*) sur la conduite et la discipline des employés visés au paragraphe (2), la présentation de griefs par ceux-ci, l'étude de ces griefs et leur renvoi à l'arbitrage.

The following section of the *Federal Courts Act*, RSC 1985, c F-7, is relevant to the present application for judicial review:

JURISDICTION OF FEDERAL COURT	COMPÉTENCE DE LA COUR FÉDÉRALE
…	[…]
Application for judicial review	Demande de contrôle judiciaire
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Time limitation	Délai de présentation
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Powers of Federal Court	Pouvoirs de la Cour fédérale
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

…

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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