Federal Court  Cour fédérale

Date: 20130715

Docket: T-383-13

Citation: 2013 FC 781

Toronto, Ontario, July 15, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

BABAK (BOB) RAFIZADEH

Applicant

and

TORONTO DOMINION BANK

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Adjudicator acting under the provisions of the Canada Labour Code, RSC 1985, c. L-2, dated February 20, 2013, wherein the Applicant's complaint that he was unjustly dismissed was dismissed for abuse of process. For the reasons that follow, I am dismissing this application, with costs.

[2] The Applicant Babak (Bob) Rafizadeh was employed by the Respondent Toronto Dominion Bank (TD Bank) as a commissioned Senior Mobile Mortgage Specialist. He would contact prospective clients seeking a mortgage. Many of these persons would be referred to him by his

family members, such as his mother. The referring persons would be given points by the TD Bank on a rewards scheme, allowing them to redeem points for merchandise. The Applicant would obtain from these persons copies of documents such as the contract for purchase of the home, employment information, and the like, and present all of this to a person at the TD Bank who would review the material and determine if the person were to be given a mortgage.

[3] In the course of his duties, the Applicant observed what he perceived to be irregularities in the handling of certain mortgage applications by others at the Bank. He took steps to "blow the whistle" and report his observations to his superiors. In the course of dealing with what he perceived to be his whistle blowing reports, the Applicant was called in by TD Bank officials, who charged him with irregularities and dismissed him. The Applicant filed a complaint under the Canada Labour Code.

[4] In the proceedings under the Canada Labour Code, the Adjudicator made an Order requiring each of the parties to produce copies of certain documents. The Applicant produced, among other things, copies of what he alleged to be emails between him and two of his superiors at the TD Bank - Morrison and Nicholson. These emails, if genuine, could possibly have served to support the Applicant's assertions as to unjust dismissal.

[5] The parties met in an endeavour to mediate the dispute. The Adjudicator acted as the mediator. The mediation did not resolve the matter.

[6] As the proceedings moved on, the TD Bank disputed the genuineness of certain of the emails produced by the Applicant. The Adjudicator selected two of the email "strings" as representative of these emails; one with Morrison, one with Nicholson; and set down a preliminary hearing where the genuineness of these emails would be tested. If they did not prove to be genuine, the proceedings would be dismissed. If they proved to be genuine, the matter would proceed to be heard on the merits.

[7] At the hearing the TD Bank presented Morrison and Nicholson as witnesses. The TD Bank provided a report from a forensic expert as to the emails calling the genuineness of the emails into question. The person who prepared the Report, Arnet, appeared as a witness. The Applicant Rafizadeh, who previously had one, then another lawyer represent him, represented himself at the hearing and gave evidence on his own behalf. He was his only witness.

[8] The Adjudicator determined that the emails were fabricated and dismissed the complaint. I reproduce parts of the Adjudicator's reasons for his decision, which is the decision now under review:

> Page 12:
>
> *The relevant facts are set out in the notice of motion. I will set out some of the most pertinent facts here. As is noted in the notice of motion, the bank sought disclosure of certain documentation. In the production response from the counsel for the complainant dated July 16, 2012, certain documents were produced for the first time. The bank had concerns as to their authenticity. An audit was conducted and the bank formed the conclusion that at least two emails could be proven to be fabricated.*

The reason that the bank was so certain that these emails were fabricated, when it was not absolutely certain about other emails, is that these emails were "to and from" Maurice (Jay) Nicholson ("Nicholson"). Nicholson is a journalled user of email meaning that all emails that are sent to him or by him are immediately saved and kept indefinitely.

In order to simplify the motion and reduce the amount of evidence that would need to be called, I stated, prior to the evidence being called, that if the bank could establish that the complainant had falsified these two emails and, intended to rely on them in adjudication of the main matter before me, that I would dismiss the complaint for abuse of process. Conversely, if I concluded that the bank was mistaken and the bank could not prove that the emails were fabricated that I would dismiss the motion forthwith and hear the complainant's complaint.

. . .

Page 13:

I have a great deal of sympathy for the complainant and his circumstances. He is fighting to return to a job that he loved. He is of the view that the bank has fabricated all of the case against him from the reasons for his dismissal to the fabrication of a story that emails have been fabricated. He believes that all that has occurred to him is because he is a "whistle-blower" and brought to the attention of the management of the bank certain improper practices of others. To me, the issue of whether the complainant is or is not a "whistle-blower" is irrelevant to my decision. Assuming that he is a whistle-blower, that would not permit him to fabricate emails, profer them as evidence in this adjudication and then, if it was established that the emails were fraudulent, make him immune from any sanction because he was a "whistle-blower".

The complainant is not a lawyer. He did not understand that if the bank satisfied me on the balance of probabilities that the emails had been fabricated that would be sufficient to make a finding that they were fabricated and dismiss his complaint. He seemed to be of the impression that I should take "judicial notice" (my expression, not his) of certain other circumstances in which the bank had been found to have fabricated evidence. As an example, he produced a copy of a report from Bloomberg News. He did not understand that a newspaper article about that situation was not proof of anything.

...

Pages 14 – 15:

Having weighed all of the evidence, I am unable to come to any other conclusion on the balance of probabilities other than that the emails were fabricated. On the one hand, I had the testimony of the complainant that he had not fabricated the emails. He stated clearly that he would not have known how to do so. He firmly defended his reputation and character as a highly principled and professional person. On the other hand, I had (1) the testimony of the internal auditor who said they did not exist in the journalled entries, (2) the testimony of Nicholson that he had not sent nor received those emails, and (3) the testimony of Morrison that he had not sent nor received those emails. Although all three were cross-examined by the complainant, their positions were not shaken on the key evidentiary issue. The emails should have been in the journalled entries which are kept forever. They were not. Accordingly, they had not been sent by Nicholson nor received by him.

On the preponderance of the evidence, I am left with no other choice but to decide that the emails had been fabricated. It is possible had the complaint been represented by able and trained legal counsel (as he would have been had he chosen to have either Mr. Heeney or Mr. Fox represent him), he might have been able to deduce evidence to convince me otherwise. I was left with an unrepresented complainant who despite my attempts to fairly inform him of the procedure was not able to marshall his case in any compelling way. On the other hand, counsel for the bank presented the evidence necessary to convince me that there was no conclusion open to me other than that the emails were fabricated. The facts set out in the notice of motion were proven through the testimony of the three witnesses called. I am satisfied that the emails were fabricated.

As I indicated at the outset of the motion, I was prepared to dismiss the complaint if it could be proven that emails were fabricated by the complainant. I do not think there is any question that I have the jurisdiction to dismiss a complaint where there has been a finding of an abuse of the hearing process. In all the circumstances of this matter, I think it is appropriate to exercise my discretion to terminate a complaint where there has been such an abuse of process. Having made my finding, I must conclude that the complainant attempted to cover up his malfeasance by fabricating an email which he hoped would exonerate his conduct. To do so is a very serious matter. Adjudicators should not, and I will not, tolerate such behaviour by one of the parties to the matter. The complaint is dismissed.

[9] The Applicant has sought judicial review of this decision.

THE APPLICATION FOR JUDICIAL REVIEW

[10] The Applicant seeks not only to set aside the decision under review and to have the matter continued under another Adjudicator, but also seeks an Order as to production of various materials and a declaration that the TD Bank has abused the process in various respects. I have jurisdiction to set aside the decision and to require that the matter be determined by a different Adjudicator if I find that it is appropriate to do so. I will not make the declarations sought. I will not make any order as to the production of documents if the complaint were to continue, or as to the manner in which it is to continue if it is appropriate to do so; those are matters for the Adjudicator.

[11] The Applicant continues to represent himself in these proceedings, and he filed his own affidavit in support of the application before me. This affidavit not only attempts to provide information and exhibits as to what went on at the hearing, but also attaches as an exhibit a recording of parts of the mediation that preceded the hearing before the Adjudicator. That recording was not made with the consent of the mediator (Adjudicator)or the TD Bank, and I take no notice of it. No transcript of the hearing (not the mediation) itself was put in evidence.

[12] The Respondent TD Bank filed the affidavit of Catherine Peters, one of the lawyers who represented it in proceedings before the Adjudicator. This affidavit provided some history and background as to the proceedings. Ms. Peters was "cross-examined" in the sense that the Applicant sent a two-page letter with a list of questions, in response to which Ms. Peters provided one page of answers.

[13] At the hearing before me, the Applicant was self-represented. In the course of his oral argument, he endeavoured to supplement the facts in evidence and introduce new facts and materials. He was cautioned by me that my task was to deal with the matter on the basis of the evidence in the record before the Court, and that he could not introduce or rely upon new evidence. The Applicant said that he understood that; nonetheless, from time to time, he endeavoured to give new evidence in his presentation. I have had no regard to this new evidence.

THE ISSUES

[14] The Applicant has submitted in his written material and in oral argument a number of matters that he considers to be issues for determination by this Court on his judicial review. Those matters are in many respects confused and unclear. I endeavour to restate those issues as follows:

1. Was the Adjudicator biased?

2. Did the Adjudicator afford a fair hearing?

3. Was it proper for the Adjudicator to proceed on an initial determination as to abuse of process in respect of the genuineness or otherwise of the email samples?

4. Did the Adjudicator properly determine the matter of the genuineness of the emails based on the evidence before him?

ISSUE #1: Was the Adjudicator biased?

[15] There is no dispute as to the legal test respecting bias, or reasonable apprehension of bias. It has been set out many times. The Applicant cited, and I accept, the statement of that test as provided by Justice Rennie of this Court in *Bank of Montreal v Payne*, 2012 FC 431 at paragraphs 51 and 52:

> *51 The test for establishing a reasonable apprehension of bias of the decision-maker was restated by the SCC in R v S (RD), [1997] 3 SCR 484 at para 111: a reasonable apprehension of bias exists where a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the decision maker's conduct gives rise to a reasonable apprehension of bias. The decision-maker does not need to have actually been biased; rather a reasonable apprehension of bias is sufficient for there to have been a violation of procedural fairness.*
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> *52 In determining if there is a reasonable apprehension of bias the Court is to consider whether an informed person would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly: Committee for Justice & Liberty v Canada (National Energy Board) (1976), [1978] 1 SCR 369; and R v S (RD), above. Adjudicators are presumed to be impartial and thus a high standard of proof is required to establish a reasonable apprehension of bias: R v S (RD), above at para 158.*

[16] A party who alleges bias has the onus of proving it, and the threshold of proof is a high one; the grounds for apprehension of bias must be substantial; each case is to be determined on its own; I cite Perell J in *Farah v Sauvageau Holdings Inc*, 2011 ONSC 1819 at paragraphs 89 and 90:

> *89 The grounds for an apprehension of bias must be substantial: Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259 at para. 76; Committee for Justice and Liberty v. Canada (National Energy Board), supra, a p. 395, but each case must be evaluated in its own particular circumstances and in light of the whole proceeding: Wewaykum Indian Band v. Canada, supra, at para. 77; R. v. S. (R.D.), supra, at paras. 136-41.*

> *90 The party alleging bias has the onus of proving it, and the threshold of proof is a high one: Ontario (Commissioner, Provincial Police) v. MacDonald, [2009] O.J. No. 4834 (C.A.) at para. 44; R. v. Jackpine (2004), 70 O.R. (3d) 97 (C.A.) at para. 58.*

[17] In the present case, one of the allegations of bias raised by the Applicant is that the Adjudicator, some dozen years earlier, was a partner in the law firm representing the TD Bank in these proceedings. The Applicant sought to supplement this allegation by alleging that the Adjudicator has since that time been paid by that law firm to adjudicate or act upon certain matters. There is absolutely no evidence to this supplemental allegation.

[18] The fact that at one time a person now acting in an adjudicative role may have, as a lawyer, been a partner in a firm representing a party now before him or her is not, in itself, enough to raise an apprehension of bias. The longer the lapse of time between the practise of law and assuming an adjudicative role, the less likely it is that there will be genuine grounds for a reasonable apprehension of bias. I repeat what the Chief Justice of Canada wrote in her decision in *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at paragraph 85:

> *85 To us, one significant factor stands out, and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.*

[19] Neither the Applicant, nor either of his two previous lawyers, raised any objection at the time to the Adjudicator acting in this matter. The Applicant argues that the Adjudicator should have

raised his former connection himself. I disagree. A person acting in an adjudicative role cannot possibly predict what apprehensions a party may have, particularly apprehensions that are marginally relevant, if at all. The Adjudicator never concealed his legal background; he was under no duty to attempt to predict what apprehensions a party, particularly those expressed after the fact, may have.

[20] Other allegations as to "bias" made by the Applicant are based on the determinations made by the Adjudicator upon the evidence before him. The Applicant says these determinations are unreasonable and do not take into account all of the evidence and inferences that the Applicant urges should be drawn from that evidence. This is not an issue of "bias"; it is a matter of reasonableness, or in some cases, correctness of a determination.

ISSUE #2: Did the Adjudicator afford a fair hearing?

[21] The Applicant argued that the Adjudicator unfairly gave time to TD Bank to prepare its case, and that the delay prejudiced the Applicant in that the TD Bank used the delay to destroy or conceal evidence. The Applicant supported this allegation only with inferences that he invited the Court to draw from various documents and timing of those documents. I do not accept those inferences and find that there is no real and substantial evidence to support these allegations. As with the allegations of bias, the Applicant bears a heavy onus in proving the allegations. He has not discharged that onus.

[22] The Applicant further alleges that at the hearing before the Adjudicator he was prevented from putting in his case fully or properly. There is no transcript of the hearing and no evidence before me to support these allegations. I cannot accept them as being proven.

ISSUE #3: Was it proper for the Adjudicator to proceed on an initial determination as to abuse of process in respect of the genuineness or otherwise of the email samples?

[23] The Adjudicator proceeded on a preliminary hearing, which he considered would be determinative of the matter if the emails were not shown to be genuine. There is ample precedent for an Adjudicator to proceed in this manner. I repeat what was written in *Chmyg v CHC Helicopters International Inc*, [2006] C.L.A.D. 351 at paragraph 22:

> *22 In Re Budget Car Rentals Toronto Ltd. and United Food and Commercial Workers, Local 175, 87 L.A.C. (4th), Arbitrator L.M. Davie stated at page 159:*
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> > *Arbitral jurisprudence indicates that as part and parcel of the authority to enforce, an arbitrator has jurisdiction to dismiss a grievance where there has been non-compliance with an order. Thus, a grievance may be dismissed or held to be inarbitrable under the "abuse of process" rubic, where a party fails to produce documents or matters ordered to be produced by an arbitrator (Re Thompson Products Employees Assn. and Thompson Products Ltd. (1970), 22 L.A.C. 85 (Roberts); Re Nnational-Standard Co. of Canada Ltd. and C.A.W., Loc. 1917 (1994), 39 L.A.C. (4th) 228 (Palmer)), or where a grievor refuses to participate in the grievance/arbitration process, or refuses to otherwise accept the authority of the arbitration process, (Re Beacon Hill Lodges Inc. and O.N.A. (1990), 15 L.A.C. (4th) 323 (Craven)).*
> >
> > *In my view, an arbitrator should not lightly dismiss a grievance by reason of any "abuse of process", and outright dismissal of a grievance by reason of an alleged abuse of process should only occur in the clearest cases. In exercising*

> *the jurisdiction or discretion to dismiss a grievance by reason of an abuse however, it must also be remembered that the grievance and arbitration process was established to settle employment related disputes in a relatively expeditious and inexpensive manner.*
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> .
> .
> .
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> *The grievor knew what was expected of him – first, that he attend the hearing, and thereafter that he provide certain documents, and an explanation of his failure to attend the December 13, 1999, hearing. He also knew the consequences which would flow if he did not meet these expectations. He has been given every reasonable opportunity to comply, but has failed to do so. This failure amounts to an abuse of process which should not be condoned by putting the Employer, and the Union, to additional expense and effort by requiring them to arbitrate the grievance filed, when the grievor himself has shown no interest in communicating with the Union, or in cooperating with the arbitration process established in the collective agreement.*

[24] The decision went on to cite other examples, as well.

[25] Just as this Court and other Courts have a variety of procedures whereby a matter may be determined in a preliminary way prior to a hearing, including ways relating to abuse of process, so may a board or tribunal adopt like procedures. The procedure adopted here was not unfair or a denial of natural justice.

ISSUE #4: Did the Adjudicator properly determine the matter of genuineness of the emails based on the evidence before him?

[26] The Adjudicator, in this respect, is charged with fact finding. The standard of review is reasonableness; a reviewing Court will exercise great judicial restraint in considering whether to

interfere with a decision in this respect. (*Deschênes v Canadian Imperial Bank of Commerce*, 2011 FCA 216 at para 40; *Bitton v HSBC Bank Canada*, 2006 FC 1347 at paras 28 – 30.

[27] The Applicant has taken the Court through much of the evidence, including improper attempts to supplement that evidence at the hearing, and invited the Court to draw inferences as to what "must have' or "really" happened.

[28] I find that the Adjudicator's findings were well within the boundaries of reasonableness as established by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. There were many sound bases for his findings, including the fact that Nicholson's emails were journalled, such that all his emails were preserved and none of the suspect emails could be located there; and the unrebutted testimony of the forensic expert. The Adjudicator had to weigh the oral evidence of the Applicant, as well as that of Morrison and Nicholson and, while the Applicant argued that there were inconsistencies, the Adjudicator's findings were, nonetheless, reasonable. The fact that there were contradictions does not mean that the evidence was fraudulent, or that the witnesses committed perjury, as argued by the Applicant. This is not a basis for setting aside the decision under section 18.1(3)(e) of the *Federal Courts Act*, RSC 1985, c. F-7.

CONCLUSIONS AND COSTS

[29] In conclusion, I find no basis upon which the Adjudicator's decision should be set aside.

[30] As to costs, the Applicant asked for $6,500.00, which he said would cover his disbursements. The TD Bank's Counsel said that between $7,500 and $10,000 was usual in cases of this kind.

[31] I am greatly disturbed by the unfounded allegations of bias against the Adjudicator and by the Applicant's free use of terms such as fraud and perjury.

[32] Often, where a party alleges fraud or perjury or bias and fails to prove it, the Courts will award substantial costs to the opposite party. Given that the Applicant is not a lawyer and represented himself, I will allow some leeway in this respect. I will award costs to the Respondent at the high end of the customary award; namely, at $10,000.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to its costs to be paid by the Applicant, fixed in the sum of $10,000.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-383-13
STYLE OF CAUSE:	BABAK (BOB) RAFIZADEH v TORONTO DOMINION BANK
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 10, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	July 15, 2013

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