Federal Court  Cour fédérale

Date: 20140721

Docket: T-1425-13

Citation: 2014 FC 722

Ottawa, Ontario, July 21, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NAVIN JOSHI

Applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of the decision of an Adjudicator appointed under s. 242(1) of the *Canada Labour Code*, RSC, 1985, c L-2 [*Code*], dated August 1, 2013, dismissing the Applicant's

complaint of unjust dismissal based on a finding that the Adjudicator had no jurisdiction to consider the complaint [Decision].

BACKGROUND

[2] The Applicant was employed by the Respondent between May 31, 2006 and April 8, 2010. His employment was terminated because the employer said there were performance issues with his work and a lack of significant improvement over time. The Applicant filed a complaint under the *Code* alleging unjust dismissal on May 14, 2010. Shortly thereafter, on June 24, 2010, he filed a complaint with the Canadian Human Rights Commission [Commission] under the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*] alleging discriminatory conduct on the Respondent's part during the course of his employment and in terminating that employment. The jurisdictional issues that arose regarding these two simultaneous complaints resulted in the current proceeding.

[3] The Applicant, who is 61 and has a Bachelor of Commerce degree with a specialty in finance, was recruited to work for the Respondent through a program promoting employment for persons with disabilities. The Respondent offered employment to individuals who had successfully completed a six-week pre-employment training program with a grade above 80%.

[4] The Applicant completed such a program and was hired as an analyst, but he says he was never truly assigned the duties appropriate to that role or given the proper training for it. He says he was instead assigned various *ad hoc* duties and menial tasks.

[5] Dissatisfied, the Applicant sought promotions to jobs he thought were more in keeping with his knowledge and skills. Eventually, he ended up working as a "Security Analyst," a job for which he says he was ill-suited since he did not have the necessary knowledge or training. In the Applicant's view, this problem was compounded by the Respondent's failure to properly train him for the position. He says that during the two-week training program for this role he had to cover the duties of an employee who had recently moved to another position, and so was unable to take part in most of the training.

[6] In essence, the Applicant says he was set up to fail, because he was put in a position for which he was ill-suited and was not given the proper training, while being repeatedly passed over for positions for which he was better suited in favour of less-qualified candidates. He also says his work was evaluated in an unfair manner: errors committed by others were attributed to him, and work that was performed correctly was deemed incorrect. When he complained about these issues to his superiors, including through a November 2009 internal complaint of unequal treatment under the Respondent's harassment policy, he says they failed to do anything about it and ultimately fired him in reprisal.

[7] The Applicant's complaint to the Commission dealt with this purported unfair treatment, alleging that it amounted to discriminatory conduct based on his disability. His complaint under the *Code* focused more specifically on the termination of his employment, with the other issues forming the context that showed, in his view, that the termination was unjust.

[8] The Minister of Labour appointed an Adjudicator on March 25, 2011, to deal with the unjust dismissal complaint under the *Code*. Faced with two simultaneous complaints, the Respondent challenged the jurisdiction of the Adjudicator to deal with the unjust dismissal complaint based on s. 242(3.1)(b) of the *Code*. The Adjudicator scheduled a hearing for June 10, 2011 to deal with this jurisdictional issue. Adjudicator Gorsky advised the Applicant that he should consider retaining counsel due to the complexity of the issues, but the Applicant responded that he could not afford to do so.

[9] The Applicant initially took the view that the unjust dismissal claim should proceed, arguing that the two complaints were separate and distinct. However, after reviewing the cases upon which the Respondent intended to rely at the hearing, the Applicant changed his position. He stated in an email of June 8, 2011 that:

> After having read the cases you provided, I do not wish to proceed with my claim for unjust dismissal unless the Human Rights Commission, after its investigation refers the matter to the adjudicator.
>
> I agree that there should not be any duplicity [sic] in seeking redress for the dismissal and as such the adjudicator does not have authority to hear my dismissal claim at this time. Therefore, there is no point in attending the hearing on June 10, 2011.
>
> (*E-mail correspondence from Applicant*, Respondent's Record, Tab 1A(13), page 39.)

[10] Before agreeing to cancel the jurisdiction hearing, the Respondent sought clarity on the Applicant's position by return e-mail on June 9, 2011 stating:

> I ask that you please confirm the following by reply e-mail as soon as possible, in which case CIBC will agree to the cancellation of the June 10, 2011 hearing date with Adjudicator Gorsky:

> 1. You are acknowledging that Adjudicator Gorsky does not have jurisdiction to hear your unjust dismissal complaint against CIBC unless the Canadian Human Rights Commission refers the complaint back to him pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Right Act*.
>
> 2. You agree not to proceed with your unjust dismissal complaint against CIBC and consent to Adjudicator Gorsky staying the hearing of your unjust dismissal complaint against CIBC, with the hearing of the complaint only being allowed to proceed in the event that the Canadian Human Rights Commission refers the complaint back to Adjudicator Gorsky pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.
>
> Please note that if we do not receive confirmation from you on or before 5:00 p.m. today that you acknowledge and agree with (1) and (2) above in their entirety, we will attend the hearing scheduled before Adjudicator Gorsky for this Friday to deal with our preliminary motion.
>
> (*E-mail correspondence from Respondent's counsel*, Respondent's Record, Tab 1A(15), pages 42-44.)

[11] The Applicant responded as follows on the same day:

> Thank you for your reply and claryfying [sic] your position regarding this matter. I hereby agree and confirm that Adjudicator Gorsky does not have jurisdiction to hear my unjust dismissal case as set out in your email below. Hence there is no need to attend the hearing before Adjudicator Gorsky scheduled for June 10, 2011.
>
> (*E-mail correspondence from Applicant*, Respondent's Record, Tab 1A(16), page 45.)

[12] Based on the consent of the parties, Adjudicator Gorsky cancelled the hearing on the Respondent's jurisdiction motion. The complaint to the Commission remained under consideration.

[13] On August 4, 2011, an investigator with the Commission issued a report recommending that the Commission not deal with the Applicant's complaint as it could more appropriately be dealt with under the *Code*. The Applicant expressed strong disagreement with this view and requested the Commission to consider his human rights complaint on its merits. The Respondent agreed that the Commission should deal with the complaint on its merits, though it took a more limited view of the appropriate scope of the investigation, arguing that only the events occurring within the 12 months prior to the complaint (including the termination) should be considered. Ultimately, the Commission decided to consider the complaint as a whole on its merits, and notified the parties of this decision by letter of October 31, 2011.

[14] The Commission's staff conducted an investigation into the Applicant's allegations and completed an investigation report. That report, dated August 16, 2012, recommended that the Commission dismiss the complaint under s. 44(3)(b)(i) of the *CHRA*. The Applicant stated his strong disagreement with this report, and argued in several consecutive letters that the investigation was inadequate and the report's findings were flawed. The Respondent stated its agreement with the report's findings. After considering these submissions, the Commission notified the parties by letter of October 31, 2012 that:

> [T]he Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because:
>
> • the evidence does not support that the respondent failed to provide the complainant with an employment opportunity; treated the complainant in an adverse differential manner; or terminated his employment on the basis of his disability or perceived disability (undiagnosed back pain); and
>
> • having regard to all of the circumstances of the complaint, further inquiry into the matter by a Tribunal does not appear warranted.

Accordingly, the file on this matter has now been closed.

[15] Upon receiving this decision, the Applicant sought to have his unjust dismissal complaint under the *Code* determined by the Adjudicator. By that time, the original Adjudicator had resigned his post, and a new Adjudicator was appointed. The Respondent argued that the Adjudicator did not have jurisdiction to hear the complaint of unjust dismissal since the Commission had not referred the matter back to the Adjudicator under s. 41(1)(b) or s. 44(2)(b) of the *CHRA*.

[16] A hearing was held on July 25, 2013 before Adjudicator Cooper to deal with the issue of the Adjudicator's jurisdiction. Following that hearing, the Applicant sought and was granted permission to file further written submissions on this issue. On August 1, 2013, the Adjudicator issued his Decision, which dismissed the complaint on the grounds that the Adjudicator was without jurisdiction to consider it. That is the Decision under review here.

DECISION UNDER REVIEW

[17] The Adjudicator reviewed the procedural history outlined above and the positions of the parties regarding his jurisdiction. He found that he lacked jurisdiction to consider the complaint on its merits both under s. 242(3.1) of the *Code* and as a consequence of the parties' prior agreement.

[18] With respect to the language of the *Code*, the Adjudicator referred to this Court's decision *in MacFarlane v Day & Ross Inc*, 2010 FC 556 [*MacFarlane #1*] and found that it was

"not only binding" upon him but also "directly applicable to the jurisdictional issues" to be determined. He characterized that case as follows (Decision at para 26):

> … In that case, the Adjudicator had declined jurisdiction under the *Canada Labour Code* and had concluded that the Complaint under the *Canada Labour Code* was essentially the same as the Complaint under the *CHRA*. The Complainant… had argued that her Complaint under the *Canada Labour Code* was different in nature than the Complaint she had filed under the *CHRA*. Justice Mainville concluded that the Adjudicator had reasonably decided that both Complaints were essentially similar.

[19] The Adjudicator observed that Justice Mainville in *MacFarlane #1* reviewed the case law at length and referred approvingly to the dicta in *Canada (Attorney General) v Boutilier*, [2000] 3 FC 27, that Parliament intended to give primacy to expert human rights administration mechanisms over *ad hoc* Adjudicators. The Adjudicator quoted paragraphs 71-74 of *MacFarlane #1*, which read as follows:

> [71] Indeed, in adopting paragraph 242(3.1)(b) of the *Canada Labour Code*, Parliament intended to avoid a multiplicity of proceedings in the context of an unfair dismissal. The use of the imperative "shall" in paragraph 242(3.1)(b) is a clear indication that an adjudicator appointed under subsection 241(1) of the *Canada Labour Code* must refuse to hear the complaint where another procedure for redress has been provided for elsewhere in that *Code* or in another act of Parliament.
>
> [72] Moreover, in the light of *Byers Transport* and *Boutilier*, it is beyond dispute that the complaint mechanism provided for in the *Canadian Human Rights Act* is another procedure for redress within the meaning of paragraph 242(3.1)(b) of the *Canada Labour Code*.
>
> [73] Consequently, an adjudicator appointed under subsection 242(1) of the *Canada Labour Code* must decline to hear a complaint filed under subsection 240(1) of that *Code* if another substantially similar complaint has been filed under the *Canadian Human Rights Act* or, in the event that no complaint has been submitted under that Act, if the *Canada Labour Code* complaint raises human rights issues which could reasonably constitute a

> basis for a substantially similar complaint under the *Canadian Human Rights Act*.
>
> [74] However, unlike what was stated by the adjudicator in this case, an adjudicator appointed under subsection 242(1) of the *Canada Labour Code* is not wholly without jurisdiction. His jurisdiction is simply ancillary to that of the *Canadian Human Rights Commission* and of the *Canadian Human Rights Tribunal*. Consequently, the *Canadian Human Rights Commission* could, in the exercise of its statutory discretion under either paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*, refer the complaint to the adjudicator if it is satisfied that it could be more appropriately dealt with in the context of a hearing held pursuant to section 242 of the *Canada Labour Code*. I add that in such an event, the adjudicator appointed under the *Canada Labour Code* would have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal which he is appointed to adjudicate. This flows logically from the reasoning in *Boutilier*.

[20] On this basis, the Adjudicator reasoned as follows:

> 44. For the purposes of my jurisdiction as an appointed Adjudicator, the authority binding upon me in *MacFarlane v Day and Ross Inc.* is absolutely clear, and I am obliged to decline to hear Mr. Joshi's Complaint if another substantially similar Complaint was filed by Mr. Joshi under the *CHRA*.
>
> 45. The matter is therefore to be resolved on my factual determination of whether the two Complaints are, indeed, "substantially similar".
>
> 46. Even if one looks beyond the original Complaint registrations filed by Mr. Joshi and his supporting letters, a close examination of Mr. Joshi's subsequent correspondence to Adjudicator Gorsky, and to the CHRC leads to the inevitable conclusion that the Complaints are substantially similar.
>
> 47. I reach this conclusion despite Mr. Joshi's forceful submission that his Complaint to the CHRC relates to the events and circumstances of his employment, whereas his Complaint of unjust dismissal relates only to the termination of his employment. However, this is a distinction without a material difference, in the circumstances of this case. The reasons why Mr. Joshi argued that the termination of his employment was unjust is based entirely on

> his explanations for his performance based termination and the differential treatment he claims he received from his employer, and the discriminatory consequences of his disability. His consistent complaint is that he was passed over for consideration for the job he sought while others were promoted or external, less-qualified candidates, were accepted.
>
> 48. After reviewing the documentary record… the conclusion is overwhelmingly in favour of a finding of fact that the two Complaints are substantially similar.

[21] With respect to the prior agreement between the parties, the Adjudicator found that the language used by the Applicant in his correspondence with the Respondent clearly confirmed his agreement not to proceed with the process under the *Code* unless the Commission specifically ordered that the matter ought to be heard in the context of the *Code*. He found that the Applicant was not obligated to agree to this, but did so nonetheless, stating "I hereby agree and confirm that Adjudicator Gorsky does not have jurisdiction to hear my unjust dismissal case as set out in your email below." The Adjudicator found that this was not a situation that could be "characterized as some form of jurisdictional trap, into which a lay person such as Mr. Joshi has inadvertently fallen," but rather that the Applicant made a considered decision. The Adjudicator characterized the situation as follows:

> 36. It can be said that this case is a good example of the old folk adage "Be careful what you ask for, because you might get it". Mr. Joshi's lengthy communications to the CHRC repeatedly insist that his Complaint must be heard before the CHRC and not be referred back to the Adjudicator. He got what he asked for, but not the outcome he wanted, as the CHRC ultimately dismissed his Complaint after considering the matter on its merits. Understandably, the CHRC did not refer the matter back to the Adjudicator and, as a result, the stay of proceedings under the *Canada Labour Code* to which Mr. Joshi had agreed, remains in effect.

[22] The Adjudicator found that the Applicant was seeking to resile from his earlier position that the Adjudicator did not have jurisdiction to consider his unjust dismissal complaint unless that complaint was specifically referred back to him by the Commission.

[23] Thus, the Adjudicator found that he lacked jurisdiction to consider the complaint "both on the basis that Mr. Joshi willingly agreed to stay his Complaint proceedings under the Canada Labour Code, or alternatively because the Code excludes my jurisdiction to hear his Complaint." He therefore declined to hear the complaint and dismissed it.

ISSUES

[24] The issues in this application are:

a. Did the Adjudicator err in finding he had no jurisdiction to consider the complaint?

b. Was there a breach of procedural fairness?

[25] The Respondent also raises a preliminary issue of whether the affidavit filed by the Applicant in this matter is admissible.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[27] In *MacFarlane #1*, above, Justice Mainville (as he then was) undertook a careful review of the standard of review to be applied in a case such as this. He followed *Canada Post Corp v Pollard*, [1994] 1 FC 652, [1993] FCJ No 1038 (FCA) [*Pollard*] and *Byers Transport Ltd v Kosanovich*, [1995] 3 FC 354, 126 DLR (4th) 679 (FCA), leave to appeal dismissed [1995] SCCA No 444, in finding that decisions of adjudicators made pursuant to s. 242(3.1) of the *Code* are jurisdictional questions to which a standard of correctness applies, notwithstanding the presence of a privative clause in s. 243 of the *Code*. He found that *Dunmsuir*, above, had not changed the standard of review applicable to such cases, because the question involved was a true question of jurisdiction: see the analogous case of *Johal v Canada (Revenue Agency)*, 2009 FCA 276, cited by Justice Mainville, dealing with s. 208(2) of the *Public Service Labour Relations Act*, SC 2003, c 22. While the Supreme Court has since cautioned that the category of "true questions of jurisdiction" is a narrow one (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34, per Rothstein J, and para 80, per Binnie J), I agree with Justice Mainville that the issue that arises here falls within that category. As such, I follow him in finding that a standard of correctness applies.

[28] To the extent that the Decision also turns on the Adjudicator's interpretation of ss. 41(1)(b) and 44(2)(b) of the *CHRA*, I would adopt Justice Barnes' analysis from the subsequent case of *MacFarlane v Day & Ross Inc*, 2011 FC 377 [*MacFarlane #2*], where he found:

> [9] The issue raised on this application concerns the Adjudicator's interpretation of the *CHRA* and, in particular, those provisions which deal with the referral of a complaint to another statutory authority for adjudication. Because these provisions do not form part of the Adjudicator's home statute, his legal interpretation is reviewable on a standard of correctness: see *MacFarlane v Day & Ross Inc*., above, at para 35.

[29] Importantly, however, Justice Mainville found in *MacFarlane #1*, above, that a factual question, which also arises here, was severable from the overall question of jurisdiction and should be reviewed on a standard of reasonableness. This is the question of whether the unjust dismissal claim under the *Code* and the human rights complaint under the *CHRA* are substantially similar. I find that Justice Mainville's analysis at paras 37-38 of *MacFarlane #1* is equally applicable to the current case:

> [37] However, the adjudicator's decision in this case was predicated upon his finding of fact concerning the nature of the complaint before him. Determinations of fact are usually to be reviewed on a standard of reasonableness: *Dunsmuir*, at para. 53. Where, as in this case, the legal and jurisdictional analysis can be separated from the underlying findings of fact, this Court should show deference to the adjudicator on those findings of fact: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591, 2007 SCC 14 at para. 19; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26.
>
> [38] Consequently, though correctness is the appropriate standard of review concerning the adjudicator's interpretation and application of paragraph 242(3.1)(b) of the *Canada Labour Code*, the factual determination which must be made by the adjudicator prior to interpreting and applying that provision - and in this case, he was to determine if the complaint before him was essentially the

> same as the one submitted pursuant to the Canadian Human Rights Act - is subject to review under a standard of reasonableness.

[30] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[31] As acknowledged by the Respondent, questions of procedural fairness are reviewable on a standard of correctness: see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

STATUTORY PROVISIONS

[32] The following provisions of the *Code* are applicable in these proceedings:

Complaint to inspector for unjust dismissal	**Plainte**
240. (1) Subject to subsections (2) and 242(3.1), any person	240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite
(a) who has completed twelve	

consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

[…]

auprès d'un inspecteur si :

a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective

[…]

Reference to adjudicator

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Renvoi à un arbitre

242. (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

Powers of adjudicator

(2) An adjudicator to whom a complaint has been referred under subsection (1)

(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

(b) shall determine the procedure to be followed, but

Pouvoirs de l'arbitre

(2) Pour l'examen du cas dont il est saisi, l'arbitre :

a) dispose du délai fixé par règlement du gouverneur en conseil;

b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui

shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

[…]

Decision of adjudicator

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

[…]

présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16a), b) et c).

[…]

Décision de l'arbitre

(3) Sous réserve du paragraphe (3.1), l'arbitre :

a) décide si le congédiement était injuste;

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

Restriction

(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :

[…]

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

b) la présente loi ou une autre loi fédérale prévoit un autre recours.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Cas de congédiement injuste

(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :

a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

b) de réintégrer le plaignant dans son emploi;

c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

Decisions not to be reviewed by court

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

Caractère définitif des décisions

243. (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.

No review by certiorari, etc.	**Interdiction de recours extraordinaires**
(2) No order shall 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 proceedings of the adjudicator under section 242.	(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

[33] The following provisions of the *CHRA* are applicable in these proceedings:

Commission to deal with complaint	**Irrecevabilité**
41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
[…]	[…]
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
[…]	[…]

Report	**Rapport**
44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a	44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

report of the findings of the investigation.	
Action on receipt of report	**Suite à donner au rapport**
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
it shall refer the complainant to the appropriate authority.	
[…]	[…]

ARGUMENT

Applicant

[34] The Applicant argues that s. 242(2) of the *Code* clearly states that an adjudicator to whom a complaint has been referred under subsection (1) "shall consider the complaint…," and yet the Adjudicator in this case failed to do so.

[35] He says that only where there exists another procedure or Act for the redress of an unjust dismissal is an adjudicator justified in refusing jurisdiction under s. 242(3.1)(b). He cites *Pollard*, above, at para 13, where the Court of Appeal upheld the finding of the motions Judge

that "Where no other statutory provision is found by an adjudicator to provide a procedure for redress of a complaint of alleged unjust dismissal, the complaint is not excluded from consideration under paragraph 242(3.1)(b)." Here, the Applicant argues, no other Act or procedure existed to provide him redress for the unjust dismissal.

[36] The Applicant also argues that the Adjudicator failed to remain fair, impartial and objective, and failed to fulfill his duty to determine the procedure for the preliminary hearing and give the Applicant a full opportunity to present evidence. The Applicant notes that under s. 242(1)(b), the adjudicator "shall determine the procedure to be followed, but shall give full opportunity to the parties… to present evidence and make submissions…." Despite this clear language, he argues, the Adjudicator failed to determine the appropriate procedure for the hearing, and allowed the Respondent to dictate the procedure to be followed. Furthermore, the Respondent took 2.5 hours to present its submissions, while the Applicant was cut off by the Adjudicator after only ten minutes and did not have a full opportunity to present evidence and make submissions. The Applicant says the Adjudicator also refused to allow him to enter the dismissal letter as evidence, though it was highly relevant to the hearing.

[37] Moreover, the Applicant says he was not given proper notice of the matters to be considered at the hearing and was "ambushed" by the submissions of the Respondent. He says the grounds of the Respondent's objections to the Adjudicator's jurisdiction were not disclosed to him prior to the hearing, such that he was not prepared to respond to them. The only argument he was aware of was that he "had agreed to give the [Commission] the opportunity to determine if it could provide [him] redress for unjust dismissal."

[38] The Applicant argues that it is not surprising that the Adjudicator did not understand the difference between the discrimination complaint and the unjust dismissal complaint, because he never gave the Applicant the opportunity to exercise his right to present evidence, and was so closed minded that he did not care to see the dismissal letter. He says it was crucial for the Adjudicator to understand the reasons and the circumstances for the dismissal in order to understand the differences between the two complaints.

[39] It is obvious, the Applicant argues, that the two complaints are in fact distinct because they refer to different subject matter and different time frames. It was clear that the unjust dismissal complaint was based on misconduct by the Respondent and not discrimination, but the Adjudicator chose to ignore this fact. Furthermore, the discrimination began on May 31, 2006 and continued over four years, whereas the unjust dismissal occurred on April 8, 2010, following the Applicant's internal complaint of unfair treatment.

[40] The Applicant says the Adjudicator erred in law by failing to recognize the differences between the two complaints. He mistakenly believed that the *CHRA* was a substitute for the *Code* when in fact they are vastly different. The *Code* requires evidence of misconduct, whereas the *CHRA* requires evidence of discrimination based on prohibited grounds. The Applicant says it is generally only possible to establish a link to a prohibited ground in cases of overt discrimination, whereas the *Code* captures a broader range of misconduct, including more covert forms of discrimination. Thus, the *Code* and the *CHRA* are not substitutes and interchangeable; each is unique with its own criteria. A complaint may fail under the *CHRA* but easily succeed under the *Code* because misconduct is much easier to prove.

[41] The Applicant also says the Adjudicator showed bias in favour of the Respondent by falsely stating that the procedure for redress under the *CHRA* was the Applicant's preferred choice, when in fact it was the Respondent who obstructed the hearing of the unjust dismissal complaint under the *Code* with its jurisdictional motion. He says he made a good faith decision to agree to the stay of the unjust dismissal complaint to avoid duplication, but that doesn't mean his rights under the *Code* were extinguished. The Adjudicator should have recognized the Respondent was trying to thwart the hearing of the unjust dismissal complaint through deception. The Respondent demanded the unjust dismissal complaint be stayed pending the outcome of the human rights complaint, but resiled from its position and raised other jurisdictional objections when the Commission failed to provide redress and that objection was spent.

[42] The Applicant says that the Adjudicator erred in both fact and law by declining jurisdiction on the basis that the Applicant resiled from his earlier position. Not only is this factually incorrect, he argues, but there is nothing in the *Code* that provides for declining jurisdiction on this basis. Subsection 242(3.1) was never intended to be used as a fraudulent device to redirect an unjust dismissal complaint to the Commission, and then attack the complaint on the basis that the Commission did not refer it back to the adjudicator, he argues.

[43] The Applicant also argues that the Adjudicator erred in relying on Justice Mainville's decision in *MacFarlane #1*, above, when that case has been overruled by Justice Barnes in *MacFarlane #2*, also above, where the Court found that the Adjudicator should have considered the unjust dismissal complaint on its merits. The Applicant says there is no requirement in the *Code* that the unjust dismissal complaint be referred back to an adjudicator in order to be

considered by that adjudicator. The only requirement is that the complaint be referred by the Minister.

Respondent

[44] The Respondent raises the preliminary argument that the Applicant's affidavit should be struck in its entirety. Besides containing legal argument, the Respondent says, the affidavit seeks to provide evidence going to the merits of the unjust dismissal complaint as opposed to the question of jurisdiction, and seeks to introduce evidence that was not before the Adjudicator. This violates the general rule stated in *Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19 [*Assn of Universities and Colleges*], and none of the exceptions enumerated by the Court of Appeal applies.

[45] In addition, the Respondent says there are facts relied upon by the Applicant in his factum that are not even found in his affidavit or anywhere else in the evidentiary record, and these should be struck as well.

[46] With respect to the merits, the Respondent says that the Adjudicator was right to find that *MacFarlane #1* is both binding and directly relevant in the current matter. There, the Court found that the purpose of s. 242(3.1)(b) of the *Code* is to avoid a multiplicity of proceedings in the context of an unjust dismissal (para 71), and that it is beyond dispute that the complaints mechanisms under the *CHRA* constitute another "procedure for redress" within the meaning of s. 242(3.1)(b) (para 72).

[47] In accordance with *MacFarlane #1*, the Respondent argues, the test for determining whether s. 242(3.1)(b) of the *Code* has ousted an adjudicator's jurisdiction to hear a complaint of unjust dismissal is whether the complaint of unjust dismissal under the *Code* and the human rights complaint under the *CHRA* are substantially similar (para 73). If the Commission exercises its discretion under s. 41(1)(b) or s. 44(2)(b) of the *CHRA* to refer the matter back, the adjudicator may hear the complaint of unjust dismissal even if it is substantially similar to the human rights complaint. However, these provisions have a narrow scope, the Respondent says, and are only triggered where the Commission accepts that the human rights complaint is one that could more appropriately be dealt with under an act of Parliament other than the *CHRA*. Otherwise, an adjudicator appointed under the *Code* has no jurisdiction to hear a complaint that is substantially similar to a human rights complaint: see *MacFarlane #1*, above; *Aganeh v Rogers Communications Inc*, [2010] CLAD No 285; *Faris v Overland West Freight Lines Ltd*, [2012] CLAD No 77 [*Faris*].

[48] Contrary to what the Applicant argues, Justice Mainville's decision in *MacFarlane #1* was not overruled by Justice Barnes in *MacFarlane #2*, the Respondent argues. Rather, *MacFarlane #2* dealt with a later development where the adjudicator still refused jurisdiction to hear the case even though the Commission had decided under s. 44(2)(b) of the *CHRA* that the matter could be more appropriately dealt with under the *Code*. The Respondent says Justice Mainville's decision in *MacFarlane #1* remains good law and is the leading authority.

[49] The Respondent argues that the Adjudicator's finding that the stay of proceedings remains in effect was amply supported by the record, and in particular the chain of e-mail

correspondence reviewed by the Adjudicator. The Adjudicator was right to conclude that the conditions to which the Applicant agreed were unambiguous and straightforward. The Applicant did not have to agree to these conditions, but did so without reservation. It was on the basis of this agreement that Adjudicator Gorsky cancelled the hearing scheduled for the Respondent's preliminary objection.

[50] The Respondent notes that the Commission dealt with the Applicant's human rights complaint and conducted an investigation into its merits, and the Applicant's termination was one of the matters investigated. The Commission dismissed the complaint because the evidence did not support the allegations underlying the complaint. Having actually dealt with and dismissed the complaint, it cannot be said that the Commission concluded that the complaint was one that could more appropriately be dealt with under the *Code*. There was nothing to refer back to the Adjudicator under ss. 41(1)(b) or 44(2)(b) of the *CHRA*, because the Commission dealt with the complaint and found that it had no merit.

[51] The Respondent says that it is obvious from a plain reading of the provisions that a decision to dismiss a human rights complaint after conducting an investigation is not a referral under ss. 41(1)(b) or 44(2)(b) of the *CHRA*. In the absence of such a referral, the stay of the unjust dismissal complaint remained in effect.

[52] With respect to whether the unjust dismissal complaint and the human rights complaint were substantially similar, the Respondent submits that this is best determined by examining the complaints themselves and any supporting submissions or reports that elaborate upon the nature

of the complaints. The fact that the Commission found the human rights complaint to be without foundation has no bearing on whether the two complaints were substantially similar: *Faris*, above. Here, the Respondent argues, the Adjudicator performed this examination and reasonably found that "the conclusion is overwhelmingly in favour of a finding of fact that the two Complaints are substantially similar." The record and the Adjudicator's reasons provide clear support for this finding.

[53] With respect to issues of procedural fairness, the Respondent says that the dismissal letter was received into evidence (*Affidavit of Gail Oxtoby*, Respondent's Record, Tabs 1 and 1B, pages 2 and 145-146), and the Applicant submitted a factum to the Adjudicator at the hearing that explicitly addressed the Respondent's position that the Adjudicator did not have jurisdiction to proceed with the complaint (*Affidavit of Gail Oxtoby*, Respondent's Record, Tabs 1 and 1C, pages 2 and 152-160). The Respondent says there is no evidence before the Court regarding the time that the parties were given to present their respective cases, the Applicant having provided no evidence on this in his affidavit, but in any event, the Applicant sought and received consent to file additional submissions after the hearing, and did so. As such, there can be no question that the Applicant was given a full and fair opportunity to present his case.

ANALYSIS

Introduction

[54] Mr. Joshi represented himself very well before me and revealed himself as more than capable of addressing the legal issues to which this application gives rise. Unfortunately, he is

attempting to change history and have the Court disregard and set aside a legal process to which he freely assented and which he actively promoted when he thought it was in his interests to do so. That process did not yield the result he wanted and he is now attempting to renege upon his former commitments so that his complaint can be heard by an adjudicator under the *Code* whom he previously said did not have the authority "to hear my dismissal claim."

[55] This application has little merit and the Applicant has attempted to bolster the defects with an affidavit that seeks to argue the merits of the unjust dismissal complaint under the *Code* rather than addressing the jurisdictional issue that is before the Court. In addition, the Applicant has attempted to adduce evidence that was not before Adjudicator Cooper, who made the Decision, and to introduce legal argument into the affidavit. This is not permissible. See *Assn of Universities and Colleges*, above, at paras 16-20.

[56] The Applicant has attempted to convince the Court that he did not agree to forego his unfair dismissal claim unless the Commission referred it back to an adjudicator under s. 41(1)(b) or s. 42(2)(b) of the *CHRA*. This may not be dispositive, but it certainly reflects badly upon the Applicant that he now reneges on his commitment when his forum of choice – the Commission – did not rule in his favour or refer the matter back to an adjudicator under the *Code*.

[57] As Adjudicator Cooper pointed out, the question before him on jurisdiction was essentially factual: "The matter is therefore to be resolved on my factual determination of whether the two Complaints are indeed, 'substantially similar.'" The Adjudicator's finding of substantial similarity was reasonable. It was transparent, intelligent and justifiable, and does not

fall outside the range of possible, acceptable outcomes which are defensible on the facts and law. See *Dunsmuir*, above, at para 47.

[58] The Adjudicator was, on the facts of this case, correct to consider himself bound by the decision of Justice Mainville (as he then was) in *MacFarlane #1*, above, which was not in any way overruled by Justice Barnes in *MacFarlane #2*, above.

[59] There is no proper evidentiary basis to support the Applicant's allegations of abuse of process, bias, or procedural unfairness. There is nothing before me to suggest that both sides were not given a full opportunity to present their respective cases or that the Respondent was granted more favourable treatment in this regard.

[60] I will deal with the Applicant's specific points in turn.

Refusal to Exercise Jurisdiction

[61] Mr. Joshi says that Adjudicator Cooper was legally obliged to hear his unfair dismissal claim under the *Code* because s. 242(2) of the *Code* compels him to do so unless, in accordance with s. 242(3.1)(b), "a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament." Mr. Joshi says that his unfair dismissal complaint has not been, and cannot be, addressed under the *CHRA* by the Commission.

[62] Mr. Joshi previously agreed that an adjudicator under the *Code* "does not have the authority to hear my unjust dismissal case…", and he previously agreed that he would not

proceed with his unjust dismissal complaint against the Respondent unless "the Canadian Human Rights Commission refers the complaint back… pursuant to 41(1)(b), or paragraph 44(2)(b) of the Canadian Human Rights Act."

[63] Mr. Joshi now says he did not agree to what the record reveals he unreservedly agreed to. He also says any such agreement does not matter because Justice Barnes, in *MacFarlane #2*, above, changed the law as established by Justice Mainville in *MacFarlane #1*, above. *MacFarlane #2* does not, however, change the law set out in *MacFarlane #1*. In *MacFarlane #2*, Justice Barnes was dealing with a situation where the adjudicator had refused to hear Ms. MacFarlane's complaint after the Commission had ruled it was more appropriately dealt with under the *Code* than under the *CHRA*. If Ms. MacFarlane's complaint was not dealt with under the *Code*, then she would have been without a remedy because the Commission had declined to deal with it. Justice Barnes simply made it clear that a specific referral back to an adjudicator was not required. Such a referral was implicit in the finding that the complaint was more appropriately dealt with under the *Code*. The facts of the present case are entirely different.

[64] Mr. Joshi's whole complaint against the Respondent has been dealt with by the Commission and there is nothing to refer back to be decided under the *Code*. The Commission neither referred the matter back under s. 41(1)(b) or 44(2)(b) nor found that the complaint was more appropriately dealt with under the *Code*. Mr. Joshi was not left without a remedy. In fact, his complaint was dealt with as he agreed it should be dealt with. He simply wants to have it heard again because he did not get the result he wanted.

[65] Subparagraph 242(3.1)(b) did not compel Adjudicator Cooper to hear Mr. Joshi's complaint because, in accordance with that provision and with Mr. Joshi's own wishes, a procedure for redress has already been provided elsewhere under the *CHRA*. Adjudicator Cooper was bound by *MacFarlane #1*, above.

Failure to observe a Principle of Natural Justice, Procedural Fairness or Other Procedure that he was required by law to observe

[66] Mr. Joshi has provided no evidence to support this allegation. He submitted an affidavit that addresses what happened while employed by the Respondent, but it says nothing about the issues that he now brings before the Court.

[67] At the hearing before me, Mr. Joshi said that he was prevented from submitting evidence to Adjudicator Cooper that would have shown that his unfair dismissal claim was, in fact, not "substantially similar" to his human rights complaint. He refers me back to his original unfair dismissal complaint and what it says about the reasons for his dismissal. However, there is really nothing before me to establish that Mr. Joshi could not have made any submissions he wished to make to Adjudicator Cooper.

[68] He says that he was unable to submit the dismissal letter from the Respondent, but the record shows that the letter was accepted into evidence.

[69] The record also shows that Mr. Joshi submitted a factum to the Adjudicator at the hearing which addresses the Respondent's position that Adjudicator Cooper did not have jurisdiction to proceed with the complaint of unjust dismissal.

[70] There is no evidence that Mr. Joshi was not given the time he needed to make any presentation he wished to make, and following the hearing the Respondent gave its consent to Mr. Joshi's filing written submissions summarizing his case. He did this and his "Complainant's Summary of the Jurisdiction Hearing" became part of the record before the Adjudicator.

[71] There is insufficient evidence before me to support Mr. Joshi's present allegations of procedural unfairness, abuse of process or bias.

Erroneous Findings of Fact

[72] Mr. Joshi says that Adjudicator was wrong and unreasonable in finding that he "resiled" from his earlier commitment and using this as a justification to refuse jurisdiction. He argues there was no authority under the *Code* to decline jurisdiction.

[73] Whether these are errors of fact or law, I have already dealt with them above. There is no factual error in saying that Mr. Joshi resiled from his previous position. The record overwhelmingly supports such a conclusion. And the Decision is based not just upon Mr. Joshi's previous agreement that his complaint would be dealt with by the Commission, but also on Adjudicator Cooper's compliance with statutory requirements and the law established by Justice Mainville in *MacFarlane #1*.

Error of Law in Refusing to hear the unjust dismissal complaint pursuant to s. 242(2) of the Code

[74] Essentially, this is a repetition of Mr. Joshi's argument that s. 242(3.1)(b) compelled Adjudicator Cooper to hear his unjust dismissal complaint and that the law established in *MacFarlane #1*, above, has been "overruled" by Justice Barnes in *MacFarlane #2*, above. I have already dealt with these arguments above. There were no errors of law in this regard.

[75] Mr. Joshi also says that the Adjudicator made an error of law "when he failed to understand the difference between the CHRA complaint and the CLC complaint." There was no error here. Adjudicator Cooper makes this the central issue in his Decision and he decides it as directed by Justice Mainville (as he then was) in *MacFarlane #1*. Adjudicator Cooper says at para 45 of the Decision that the "matter is therefore to be resolved on my factual determination of whether the two Complaints are, indeed, 'substantially' similar."

[76] Adjudicator Cooper then examines the record on this issue and provides justification, transparency and intelligibility in a Decision that falls well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Mr. Joshi disagrees with the Decision but he has raised no reviewable error that would justify the Court now setting it aside.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to the Respondent.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 9, 2014
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DATED:	JULY 21, 2014

APPEARANCES:

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