

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201216

Docket: A-420-19

Citation: 2020 FCA 218

**CORAM: NADON J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

CHANDRAHAS JOG

Appellant

and

BANK OF MONTREAL

Respondent

Heard by online video conference hosted by the Registry on December 15, 2020.

Judgment delivered at Ottawa, Ontario, on December 16, 2020.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**NADON J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal of a decision of the Federal Court (McDonald J.), dismissing Mr. Jog's application for judicial review (2019 FC 1326) (FC decision). Mr. Jog filed a complaint of unjust dismissal against the Bank of Montreal (BMO) under section 240 of the *Canada Labour Code*, R.S.C., 1985, c. L-2. On December 5, 2018, following a preliminary decision made on November 6, 2018 dismissing Mr. Jog's request that he recuse himself, the Adjudicator dismissed Mr. Jog's complaint on the basis of "Mr. Jog's insistence that he would not continue to

participate in the hearing that commenced on October 30, 2018”. Mr. Jog, a self-represented litigant, applied for judicial review of that final decision.

[2] The Federal Court applied the standard of reasonableness to the final decision including on the issue of whether the Adjudicator properly construed his power to dismiss a complaint for refusal to participate in the proceedings (FC decision at paras. 34-35). It found that the decision was reasonable. With respect to procedural fairness, it applied the standard of correctness and held that there was no evidence that Mr. Jog was denied procedural fairness. It found that the Adjudicator applied the proper test to deal with the motion for recusal and reached the correct conclusion concerning Mr. Jog’s allegation of bias.

[3] The role of this Court on an appeal such as this one is well established. This Court must determine whether the Federal Court identified the appropriate standards of review and applied them correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47. Thus, the focus is on the administrative decision, not the Federal Court decision. This Court steps into the shoes of the reviewing court.

[4] Although the Federal Court decision was issued prior to the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], the Federal Court applied the appropriate standards of review to the issues before it.

[5] Mr. Jog’s submissions before us and his notice of appeal include many arguments that are not relevant to this appeal. For example, he contests the merits of the Adjudicator’s refusal to

order the production of a compliance report that BMO could not locate and his reply to an anonymous employer's survey and also the Adjudicator's preliminary decision refusing to allow him to record the proceedings on his own personal device. He also raises various issues going to the merits of the unjust dismissal complaint he placed before the Adjudicator.

[6] The procedural rulings of the Adjudicator are final and are not the subject of this appeal. It is also not the role of this Court nor the Federal Court to determine or comment on the merits of the complaint for unjust dismissal.

[7] The Federal Court correctly found that there was no evidence of any reasonable apprehension of bias on the part of the Adjudicator.

[8] Turning to the reasonableness of the decision, the Adjudicator's view that he had the power to dismiss the complaint for refusal to proceed was reasonable and in fact correct. The real issue before us is whether the exercise of that power in the circumstances of this case was reasonable.

[9] Following his preliminary decision dated November 6, 2018, the Adjudicator chose to await a decision of the Minister or the Department of Human Resources and Skills Development Canada (HRSDC) on Mr. Jog's request to replace him before dismissing the complaint. Having done so, when considering whether to dismiss Mr. Jog's complaint in December 2018, the Adjudicator was bound to consider all the developments that took place after his preliminary decision.

[10] It is clear that Mr. Jog refused to proceed with the hearing that commenced on October 30, 2018 because of his allegation of bias and his belief that the Minister or the HRSDC could appoint a new adjudicator. Later, on November 16, 2018, he was advised that neither the Minister nor the HRSDC had the authority to intervene in the adjudication process. Right after that, he wrote to the Adjudicator requesting an adjournment of his complaint until the Ontario Superior Court of Justice had decided his action for the tort of intrusion upon seclusion against BMO, which in his view, was at the core of his complaint and was outside of the Adjudicator's jurisdiction. I note that neither party was asked by the Adjudicator to provide submissions in respect of this request.

[11] The Adjudicator did not respond to the merits of this request other than to say that he had already adjourned the matter and there was no need for a further adjournment. Mr. Jog replied on November 19, 2018 to explain why he made such a request.

[12] By putting forward a different reason for an adjournment, one that was potentially longer, Mr. Jog did show some engagement in the process. This was not an abandonment of the process.

[13] The Adjudicator's final decision dismissing the complaint based on a continued refusal to participate refers only to what took place on October 30, 2018 and November 1, 2018 (the date when Mr. Jog requested the Minister's intervention), not the later communications from Mr. Jog that indicated engagement with the process, not abandonment. There is no evidence that Mr. Jog persisted in his refusal to participate in the process at any time after November 1, 2018. He did not write to the Minister following the release of the preliminary decision and wrote to the

Adjudicator requesting an adjournment pending the resolution of the Ontario proceedings as soon as his request to the Minister was answered.

[14] Given the communications from Mr. Jog after the preliminary decision that suggest engagement with the process, the Adjudicator had to provide some explanation in his dismissal decision dated December 5, 2018 concerning those communications. Because the decision does not grapple with these communications, it lacks the transparent, intelligible and justified explanation required by *Vavilov* (at para. 15) and thus, is unreasonable.

[15] I cannot discern if the Adjudicator thought that he had already made the decision to dismiss subject only to being replaced by a new adjudicator. If this was so, then why was his only response to Mr. Jog's request on November 16, 2018 that he had already adjourned? Why did he not make his position clear after receiving Mr. Jog's email on November 19? There may be good reasons not to grant the adjournment Mr. Jog requested but the Adjudicator did not offer them and it is not for this Court to decide.

[16] Furthermore, it is important to consider that as a matter of procedural fairness, a complaint like any other claim should only be dismissed when a party's failure to participate is clear. Here, the situation was equivocal at best. Before dismissing the complaint, in the circumstances of this case, it was incumbent on the Adjudicator to resume the proceedings, which had been adjourned on October 30, 2018, to see if Mr. Jog was willing to proceed now that recusal and a possible intervention by the Minister was no longer an issue.

[17] In light of the foregoing, the appeal should be allowed and the decision of the Federal Court set aside. Rendering the decision that should have been made, I would allow the application for judicial review and return the matter to the same or another adjudicator if the first is not available. I propose that Mr. Jog be granted his taxable disbursements in this Court and the Federal Court.

"Johanne Gauthier"

J.A.

"I agree
M. Nadon J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE MCDONALD DATED
OCTOBER 23, 2019, NO. T-2186-18**

DOCKET: A-420-19

STYLE OF CAUSE: CHANDRAHAS JOG v. BANK
OF MONTREAL

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: DECEMBER 15, 2020

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
STRATAS J.A.

DATED: DECEMBER 16, 2020

APPEARANCES:

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ON HIS OWN BEHALF

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