

Federal Court



Cour fédérale

Date: 20191023

Docket: T-2186-18

Citation: 2019 FC 1326

Ottawa, Ontario, October 23, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

CHANDRAHAS M. JOG

Applicant

and

BMO BANK OF MONTREAL

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Chandrahas Jog, filed a complaint of unjust dismissal against the Bank of Montreal (BMO) under s. 240 of the *Canada Labour Code* RSC c L-2 [CLC]. Mr. Jog's CLC complaint was dismissed when he refused to participate in the adjudication process. He seeks judicial review of the dismissal of his complaint. Mr. Jog represented himself in the CLC proceedings and also represented himself on this judicial review application.

[2] For the reasons outlined below, this judicial review application is dismissed. The CLC adjudicator's (Adjudicator) decision to dismiss Mr. Jog's complaint as a result of Mr. Jog's refusal to participate in the adjudication process was reasonable. Additionally, I conclude that there was no breach of Mr. Jog's procedural fairness rights in the CLC proceedings.

Relevant Background

[3] Mr. Jog was employed by BMO in the Toronto Area from 2004 to 2017. As a result of injuries he sustained in a motor vehicle accident, Mr. Jog was on disability leave from BMO from March 2007 to September 2015. He returned to work with BMO in September 2015, but because of his lengthy absence from the Bank, retraining was necessary. As well, due to his medical conditions BMO arranged for ergonomic and medical assessments in order to accommodate Mr. Jog's disabilities on his return to work.

[4] On February 1, 2017, after attempts at retraining Mr. Jog in a customer facing position were unsuccessful, he was advised that he would be terminated by BMO within 60 days unless he could secure a non-customer facing position within BMO. Two days after receiving this notice, Mr. Jog filed an unjust dismissal complaint under the CLC.

[5] On April 4, 2017, Mr. Jog's employment with BMO ended. He refiled his unjust dismissal complaint under the CLC the same day.

Canada Labour Code Proceedings

[6] Prior to proceeding with the adjudication of Mr. Jog's complaint under the *Canada Labour Code*, Mr. Jog and BMO agreed to attempt a mediation of his complaint with the Adjudicator appointed under the CLC. The mediation was held in February 2018, however, it was unsuccessful.

[7] Following the failed mediation, the adjudication of his complaint was scheduled to proceed on October 30, 2018. Prior to the start of the adjudication, the Adjudicator addressed two preliminary procedural issues. One was Mr. Jog's request that BMO produce a copy of a BrainFX assessment report. This assessment was completed in relation to the efforts by BMO to accommodate Mr. Jog's return to work following the motor vehicle accident referred to above. The BrainFX assessment is addressed in more detail below, but for present purposes, it is sufficient to note that BMO was unable to produce this document. In the circumstances, the Adjudicator was satisfied that BMO had undertaken best efforts to obtain the document, and he ordered that the adjudication proceed without the document.

[8] The second procedural issue addressed by the Adjudicator was Mr. Jog's request to make an audio recording of the hearing. Mr. Jog explained that he wanted to record the CLC proceeding because court proceedings are recorded. The Adjudicator considered Mr. Jog's request, but noted that as the Adjudicator, he had control over the process, and declined Mr. Jog's request to record the proceedings.

[9] As a result of these two preliminary rulings, Mr. Jog took the position that the Adjudicator was biased and at the opening of the hearing on October 30, 2018, Mr. Jog requested that the Adjudicator recuse himself. In response, the Adjudicator adjourned the proceeding. Following the adjournment, Mr. Jog sent the Adjudicator an email reiterating his request for his recusal.

[10] The Adjudicator advised the parties that he would consider the recusal request and issue a preliminary decision (Preliminary Decision) before proceeding with the adjudication.

[11] On November 6, 2018, the Adjudicator issued his Preliminary Decision where he declined to recuse himself on the grounds that Mr. Jog had not been able to point to any behaviour that would give rise to a reasonable apprehension of bias. His Preliminary Decision notes that the only grounds raised by Mr. Jog to establish bias was that the two procedural rulings did not go in his favour.

[12] Following receipt of the Preliminary Decision, Mr. Jog wrote to the Minister of Labour asking to have the Adjudicator removed. The Minister responded that the Department did not have the authority to intervene in the adjudication process.

[13] In a November 16, 2018 email to the Adjudicator, Mr. Jog informed the Adjudicator that he would not be participating in the adjudication. His email states: "...as suggested earlier please adjourn the adjudication sine die [sic] till the torts part is resolved. Adjudication will proceed only when this part is cleared through a court".

[14] On December 5, 2018, the Arbitrator issued his final decision (Final Decision) in which he dismissed Mr. Jog's complaint due to his withdrawal from the adjudication process. In dismissing Mr. Jog's complaint, the Adjudicator states:

...the Department confirmed my own understanding that I possessed the jurisdiction to not only decide whether the motion to recuse has any merit, but also that once Mr. Jog refused to proceed with the hearing I possess the jurisdiction to control the adjudicative process, including the power to dismiss his complaint.

Given the above, and given Mr. Jog's insistence that he would not continue to participate in the hearing that commenced on October 30, 2018 I hereby dismiss the complaint.

[15] In this judicial review application, Mr. Jog seeks review of the December 5, 2018 Final Decision of the Adjudicator. Mr. Jog states that he wants to "continue" with adjudication with a different adjudicator.

Canada Labour Code Provisions

[16] The relevant provisions of the CLC are outlined below.

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 auprès d'un inspecteur si :
(a) who has completed twelve consecutive months of continuous employment by an employer, and	a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) who is not a member of a group of employees subject	b) d'autre part, elle ne fait pas partie d'un groupe

to a collective agreement,	d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	

Powers of adjudicator**Pouvoirs de l'arbitre**

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

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

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

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

Issues

[17] In his oral and written submissions, Mr. Jog makes a number of legal claims including breach of privacy, intrusion upon seclusion, human rights violations, failure of BMO to disclose documents, and breach of his *Canadian Charter of Right and Freedoms* (*Charter*) rights. He states that these arise from the Adjudicator acting "without jurisdiction" and failing "to observe a principle of natural justice, procedural fairness or other procedure required by law to observe". He also says the Adjudicator "erred in law in making [his] decision".

[18] These issues go beyond the jurisdiction of this Court on judicial review of the Adjudicator's decision to dismiss Mr. Jog's complaint. In my view, the issues are as follows:

1. What is the scope of this judicial review?
2. Was there a breach of procedural fairness to Mr. Jog?
3. Is the Adjudicator's decision to dismiss Mr. Jog's complaint reasonable?

Standard of Review

[19] The standard of review of an administrative decision-maker interpreting its home statute is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, para 54 [*Dunsmuir*]).

[20] In the context of unjust dismissal cases under the *Canada Labour Code*, this Court has confirmed that reasonableness is the standard of review and procedural fairness issues are reviewed for correctness (*Skinner v Fedex Groud Ltd*, 2014 FC 426, para 5 [*Skinner*]).

Analysis

What is the scope of this judicial review?

[21] Despite the various arguments and issues raised by Mr. Jog, on this judicial review, it is only the Adjudicator's Final Decision that is under consideration. As Justice Brown noted in *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 2, judicial review is not an opportunity to reargue the case below.

[22] Further, many of the issues raised by Mr. Jog were not raised before the Adjudicator and are therefore beyond the jurisdiction of this Court on judicial review of the decision of an arbitrator under the *Canada Labour Code*.

[23] In any event, even if this Court did have jurisdiction on some of the issues raised by Mr. Jog, such as breach of his *Charter* rights, these issues have been raised in the abstract and without any supporting evidence. I understand that Mr. Jog has commenced other legal proceedings addressing his claims regarding breach of privacy, intrusion upon seclusion, human rights violations, failure of BMO to disclose documents, and breach of his *Charter* rights. Accordingly, these issues will not be addressed here.

Was there a breach of procedural fairness to Mr. Jog?

[24] The Adjudicator's Preliminary Decision of November 6, 2018 ruled on Mr. Jog's bias allegations. Although this is not technically the decision under review - the judicial review application relates to the Final Decision dated December 5, 2018 - it is clear that Mr. Jog's procedural fairness or apprehension of bias allegations relate to the preliminary rulings of the Adjudicator. Therefore, the Adjudicator's procedural rulings are only relevant to this judicial review insofar as they may have impacted the Final Decision.

[25] In considering whether or not he should recuse himself, the Adjudicator considered the test outlined in *Jose Reyes v Jonas Lang Lasalle Real Estate Services Inc*, (2017 CanLII 1071 (ON LRB)) which states:

It is the practice of the courts and tribunals, for the respective judge or adjudicator against whom the claim of

bias is alleged to address any allegation of bias or reasonable apprehension of bias. [*Khaiter v. YUFA*, [2007] O.L.R.D. No. 5312 (Ont. L.R.B.) at para 8]

...

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. ..." [*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716 at para 40]

[26] This test was applied by the Adjudicator to determine if it would be appropriate to recuse himself in light of Mr. Jog's allegations. The Adjudicator noted that Mr. Jog's allegations were based on preliminary decisions he made which were "effectively a case management exercise". He found that the decisions were a matter of procedure, and that they did not relate to the merits of the case. He cited *Vandermeulen v Ottawa Police Association*, 2017 CanLII 95358 (ON LA) which states that "...an arbitrator has the discretionary authority to determine the procedures for the hearing so that is it fair to both parties" and that this ensures hearings proceed in an efficient and expeditious manner.

[27] The Arbitrator noted that Mr. Jog would need to show that he, the Adjudicator, had "either pre-judged the merits; pre-judged credibility; engaged in excessive and one-sided interventions with counsel...or in examination of witnesses" and the reasons for such behaviour would have to show bias. The Adjudicator concluded that Mr. Jog had not been able to establish any such conduct. Although Mr. Jog was convinced that the Adjudicator was siding with BMO, suspicion alone is not enough to support a claim of bias. In fact, as the Adjudicator properly noted, an allegation of bias requires proof. Mr. Jog did not provide any proof.

[28] In the circumstances, the Adjudicator applied the correct test and undertook the proper considerations when faced with a bias allegation. Therefore, there is no basis to conclude that the Adjudicator was biased or that Mr. Jog was denied procedural fairness.

[29] There is no evidence that the CLC process which led to the Final Decision was procedurally unfair to Mr. Jog.

[30] I now turn to consider the reasonableness of the Adjudicator's final decision.

Is the Adjudicator's decision to dismiss Mr. Jog's complaint reasonable?

[31] At this hearing Mr. Jog reargued the document production issue dealt with by the Adjudicator in his Preliminary Decision. This relates to BMO's failure to produce a copy of the BrainFX assessment which was an assessment undertaken by a third-party provider on October 12, 2016 in conjunction with Mr. Jog's return to work. Mr. Jog makes various unsupported allegations in relation to BMO's role in this assessment and BMO's failure to produce the report. However, the record indicates that Mr. Jog refused to sign a consent form to allow BMO to request a copy of the report from the third party.

[32] Mr. Jog's suspicions concerning the BrainFX report are the basis for the many of the allegations he makes including breach of his privacy and *Charter* rights. While it is difficult to follow or understand Mr. Jog's submissions in relation to the BrainFX report, as this issue was addressed in the Adjudicator's Preliminary Decision, which is not the decision under review, it need not be considered further.

[33] Another argument raised by Mr. Jog is that the Adjudicator failed to consider the merits of his claim or make any objective assessment of why he was terminated by BMO. Mr. Jog is correct that the Adjudicator did not address or assess these issues. However, the reason for this is Mr. Jog's refusal to participate in the CLC adjudication process. Upon Mr. Jog advising the Adjudicator that he would not participate in the process, the Adjudicator made a decision that he would not proceed with the assessment of the merits of Mr. Jog's claim. Mr. Jog was warned in the Adjudicator's Preliminary Decision that his refusal to participate in the process could result in his claim being dismissed.

[34] The Adjudicator interpreted s. 242(a)(b) of the CLC as providing him with the necessary authority to dismiss the complaint. This is a reasonable interpretation of the CLC and in keeping with the direction of the Federal Court of Appeal in *Dynamex Canada Inc v Mamona*, 2003 FCA 248, at para 35, where the Court held that one of the objects of Part III of the *Canada Labour Code* is to provide mechanisms for the "efficient resolution of disputes arising from its provisions."

[35] Further, the Supreme Court of Canada found in *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, at para 46, that in the absence of specific rules laid down by statutes or regulation, administrative tribunals control their own procedures, as long as they comply with the rules of fairness and (when exercising a quasi-judicial function) natural justice. I also note in *Rafizadeh v Toronto-Dominion Bank*, 2013 FC 781, at para 23 [Rafizadeh] the Court confirmed that an arbitrator has the power to dismiss when a grievor refuses to participate in the process.

[36] Recognizing that the CLC adjudication could not move forward without Mr. Jog's participation as the onus was on Mr. Jog to demonstrate that he was unjustly dismissed, the Adjudicator reasonably decided to dismiss the complaint. In his Final Decision the Adjudicator wrote "...given Mr. Jog's insistence that he would not continue to participate in the hearing commenced on October 30, 2018 I hereby dismiss his complaint."

[37] The decision of the Adjudicator is reasonable and this judicial review is dismissed with costs.

[38] Mr. Jog shall pay costs to BMO in the amount of \$500.00.

JUDGMENT IN T-2186-18

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed.
2. Mr. Jog shall pay the Respondent costs in the fixed amount of \$500.00.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2186-18

STYLE OF CAUSE: CHANDRAHAS M. JOG v BMO BANK OF MONTREAL

PLACE OF HEARING: TORONTO, ONTARIO

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**REASONS FOR JUDGMENT
AND JUDGMENT:** MCDONALD J.

DATED: OCTOBER 23, 2019

APPEARANCES:

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APPLICANT
ON HIS OWN BEHALF

Benjamin T. Aberant

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil

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