Federal Court Cour fédérale

Date: 20221020

Docket: T-1210-21

Citation: 2022 FC 1434

Ottawa, Ontario, October 20, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

RAINY RIVER FIRST NATIONS

Applicant

and

KATHLEEN BOMBAY

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to s 18.1(3)(a) of a decision by an Adjudicator (the "Adjudicator") appointed under Part III of the *Canada Labour Code*, RSC 1985, c L-2 [the Code].

[2] The Respondent in this Application, Ms. Kathleen Bombay, filed an unjust dismissal complaint on July 17, 2019 (the "Complaint") against her employer Rainy River First Nations ("RRFN"). RRFN, the Applicant, is a First Nations band located in Southwestern Ontario governed by a Chief and five Councillors. Elections for the Councillors and Chief are held every two years. The Respondent was a Councillor from 2017 to 2019, and was a Councillor at the time of her termination from employment.

[3] The adjudication hearing took place via videoconference on October 26, 27, 28, and 29 2020, February 23, 24, and 25, 2021, March 16, 17, 2021, and April 29, 2021. The hearing was not recorded.

[4] On July 5, 2021, the Adjudicator found RRFN liable for the Complaint (the "Liability Decision"). In a second decision, dated October 19, 2021, the Adjudicator ordered damages be paid by the Applicant to the Respondent for lost earnings and pension contributions in the amount of $67,620.23, as well as legal fees in the amount of $17,987.82 (the "Remedy Decision").

[5] The Applicant judicially reviews both the Liability Decision and the Remedy Decision (collectively, the "Decisions"), alleging a reasonable apprehension of the bias, or actual bias, on the part of the Adjudicator, as well as arguing the Adjudicator breached the rules of fairness and natural justice by failing to consider all of the evidence.

[6] No Certified Tribunal Record ("CTR") was filed and both parties provided the record that was before the decision-maker via affidavits.

[7] In addition to providing the materials that were before the decision-maker, the Applicant submits extensive affidavit evidence, which allegedly demonstrates the Adjudicator's bias and breaches of procedural fairness.

A. *Procedural History*

[8] The Applicant sought an order pursuant to Rules 318(4) and 369 of the *Federal Court Rules*, SOR/98-106 [the Rules], requesting production of documents from the Adjudicator relating to this Application. Specifically, the Applicant sought memoranda, correspondence, the Adjudicator's notes, and a draft outline of her decision.

[9] Both the Respondent and the Adjudicator opposed the production of the documents. The Adjudicator objected on the basis that the documents were her work product and bore no relevance to the issues raised in this Application.

[10] The Associate Judge dismissed the Applicant's motion in its entirety and awarded costs of the motion to the Respondent (the "Production Decision").

[11] The Applicant subsequently appealed the Production Decision pursuant to Rules 51 and 369 of the Rules, seeking an order for production of the records. Justice Aylen dismissed the

appeal, agreeing with the Respondent that the Applicant was on a “fishing expedition” and awarded the Respondent costs.

[12] At the hearing, counsel for the Applicant still argued that he was not provided information by the Adjudicator and that she has effectively shielded her decision from review. Given that the Applicant was unsuccessful at the first instance and on appeal, this line of argument will not be entertained at this judicial review.

[13] On January 21, 2022, the Case Management Judge ordered consolidation of the two judicial review applications regarding the Liability Decision and the Remedy Decision, thus forming the Application presently before this Court.

[14] I will dismiss this judicial review with costs.

II. Issues

[15] The issues presented by the Applicant are:

A. Is the affidavit evidence of the parties admissible?

B. Whether the Adjudicator was biased, or demonstrated a reasonable apprehension of bias. Specifically:

    a. Did the Applicant waive its right to raise a breach of procedural fairness before this Court?

    b. Is there a reasonable apprehension of bias, or actual bias, on the part of the Adjudicator who made the Decisions?

C. Are the Adjudicator's Decisions unreasonable by failing to consider all of the evidence?

[16] I must first determine which parts of the affidavit materials are admissible. Only then can I move on to review the other issues, which are very much interrelated with the admissibility of the affidavit evidence.

III. Standard of Review

A. *Bias and Reasonable Apprehension of Bias*

[17] Neither of the parties have explicitly identified the bias issue raised in this case as a procedural fairness issue. Both parties have applied a substantive framework, where the Applicant argues that a breach of fairness is a "question of law of central importance to the Canadian legal system as a whole", per the *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph60 [*Vavilov*], framework.

[18] Confusingly, however, the Applicant does appear to recognize that procedural fairness requires a standard of correctness. The Applicant repeats the Federal Court of Appeal's statement that "bias allegations do not lend themselves to a standard of review analysis at all" (*Ahamed (Trustee of) v Canada*, 2020 FCA 213 at paragraph 5). During the hearing, the Applicant also recognized that procedural fairness concerns involves no deference to the decision-maker, relying on *Da Costa Serrano v Canada (Citizenship and Immigration)*, 2022 FC 174.

[19] The Applicant seems to have conflated the standard of review for procedural fairness (or lack thereof) with the substantive framework from *Vavilov* at paragraph 77.

[20] The Respondent argues that the presumption of reasonableness has not been rebutted and the reasonableness standard applies here. The Respondent says this is especially so in light of the privative clause in s 243 of the Code that existed prior to the Code amendments in 2019.

[21] While the procedural and substantive split in administrative law legitimizes the basis for review, it can be a source of difficulties for parties, as demonstrated by the parties' submissions here. The bias issue forms part of the procedural fairness inquiry.

[22] Although there is ongoing debate as to the standard of review, or whether there is even a standard of review for issues of procedural fairness, the Federal Courts have predominantly adopted the correctness standard: see *Lawlor v Canada (Attorney General),* 2022 FC 821 at paragraph 46; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43. The focus of the reviewing court is focused on whether the process was fair, bearing in mind the duty of procedural fairness is variable, flexible and context-specific: *Vavilov* at paragraph 77.

B. *Failure to Consider all the Evidence*

[23] Whether the Adjudicator breached the rules of fairness and natural justice by failing to consider all of the evidence is a substantive issue. Although the requirement to give reasons is an aspect of the duty of procedural fairness, an analysis into the responsiveness of the Adjudicator to evidence is a question for substantive review. The real question is whether the Adjudicator failed to respond adequately to the evidence in her reasons.

[24] On this issue, there is nothing to suggest a departure from *Vavilov's* reasonableness standard is required in these circumstances. The narrow exceptions articulated in *Vavilov* do not

apply here. The Applicant has conflated procedural fairness review with substantive review and this is not a question of law of central importance to the Canadian legal system as a whole. The standard is reasonableness.

IV. Analysis

[25] It must be said at the outset of this analysis that although the Applicant has characterized both issues as breaches of fairness and natural justice, these are veiled arguments. The Applicant has seemingly raised the bias issue as a way to circumvent the rule prohibiting new evidence on a judicial review application. This amounts, in effect, to a request for a *de novo* hearing and asks this Court to re-examine each piece of evidence that was before the Adjudicator and to consider new evidence.

[26] The Applicant's submissions are, in substance, an argument that no reasonable person would weigh the evidence or make the same findings as the Adjudicator unless they were biased or misinterpreted the evidence. Although the issues are labelled as procedural fairness and bias issues, the arguments are really directed at the findings made by the Adjudicator.

[27] As will be demonstrated in the analysis that follows, the only available issue that this Court can assess is a reasonableness review.

A. *Affidavit Materials and Evidentiary Considerations*

(1) Applicant's Submissions

[28] It bears repeating that many of the affidavit material issues and procedural fairness issues could have been avoided if the parties had a transcript or recording of the hearing, which the Respondent said was an available option that was decided against. Instead, the affidavits are from vested participants, lawyers' notes, recollections, and conclusions of what was said. These vested participants provide their interpretations of evidence that was before the Adjudicator. That is far from ideal on a judicial review and much of the evidence is inadmissible.

[29] The Applicant relies on the Supreme Court of Canada decision *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone*] as the authority to file these affidavits. The Applicant relied on *Yukon Francophone* for the proposition that a court must look to the context of the decision and argues that, although bias is a high burden, a court must consider the proceeding as a whole (at paras 26-27).

[30] In light of the Supreme Court of Canada's comments in *Yukon Francophone*, the Applicant says that the affidavit evidence in this case is offered not as new evidence but rather for the elusive context that *Yukon Francophone* recommends. Accordingly, the Applicant alleges that the normal rules prohibiting new evidence on a judicial review application do not apply in this case.

(2) The Law of Affidavit Materials

[31] Rules 81(1) and 82 of the Rules states:

Content of affidavits

81(1) Affidavits shall be confined to facts **within the deponent's personal knowledge** except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.\

Use of solicitor's affidavit

82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

[Emphasis added]

Contenu

81 (1) Les affidavits se limitent aux faits **dont le déclarant a une connaissance personnelle**, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

Poids de l'affidavit

(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

Utilisation de l'affidavit d'un avocat

82 Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

[Emphase ajoutée]

[32] Where an affiant relies on their personal knowledge of the matters deposed to, the exhibits should be within that knowledge. The requirement that affidavits be on personal knowledge embodies the common law rule against hearsay (*Bressette v Kettle & Stony Point*

First Nations Band Council, [1997] 137 FTR 189, [1997] FCJ No 1130 (QL); *Levett v Canada (Attorney General)*, 2021 FC 295 at para 30)

[33] It is also trite law that members or employees of counsel's law firm should not give opinion evidence on the most crucial issues in the case, pursuant to Rule 82 of the Rules: *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682 at paragraph 10; *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133 [*Cross-Canada Auto Body*].

[34] Concerns arise even where counsel gives factual non-opinion evidence on matters of substance. The Federal Court of Appeal has held that "[t]he goal of objectivity is not furthered by having employees of the law firms give crucial opinion evidence" (*Cross-Canada Auto Body* at para 4).

[35] The Federal Court has previously "rejected efforts to file affidavits which attach as exhibits substantive evidence from another person" (*ME2 Productions, Inc v Doe #1*, 2019 FC 214 at para 97 [*ME2 Productions*]). This is because it ends up shielding the evidence from proper cross-examination: *ME2 Productions* at paragraph 97.

[36] Where an affidavit is opinionated or argumentative, the usual remedy is to strike those portions out: see *Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at paragraph 30. While, as discussed above, the Court has the authority to strike out non-compliant affidavits, the threshold is high, especially in judicial review applications (*Gravel v Telus Communications Inc*,

2011 FCA 14 at para 5). This discretion is exercised sparingly and where it is in the interest of justice to do so (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29; *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at para 22 [*Coldwater First Nation*]). Instead of striking, the application judge can choose to draw an adverse inference or give the affidavit little or no weight: see *O'Grady v Canada (Attorney General)*, 2016 FCA 221 at paragraph 11.

[37] In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*], Justice Stratas discussed the different roles of administrative decision-makers and the Court in reviewing those decisions. Justice Stratas confirmed that the purpose of judicial review is to canvass a review of the certified tribunal record, and not to adjudicate on the basis of further evidence not before the decision-maker. As Justice Stratas stated in *Access Copyright*, "[a]ccordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board" (at para 19).

[38] In *Access Copyright* at paragraph 20, Justice Stratas set out a list of non-exhaustive potential exceptions where the Court can receive affidavit evidence in a judicial review application. Three such exceptions are:

> (a) Sometimes this Court will receive an affidavit that provides **general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review…**
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review **court procedural defects that cannot be found in the evidentiary record of the administrative decision-**

> **maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness….**
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight **the complete absence of evidence before the administrative decision-maker...**
>
> [Emphasis added]

[39] Although it is true that affidavit evidence is permissible to assist the Court's determination as to whether there was a procedural breach this is not such a time. There are also numerous evidentiary concerns that arise from the affidavit evidence in this case.

[40] Information which purports to assert factual truths, such as notes of events, involves hearsay evidence, and double hearsay evidence where the affiant was not the note taker: see *Abdel Kadder v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 914 at paragraph 29. Although affidavits that set out background evidence is a permissible allowance of hearsay, this does not create a "back alley" by which a party can smuggle non first-hand evidence into an application for the truth of its contents (*Coldwater First Nation* at para 39).

[41] *Gravel v Telus Communications, Inc,* 2010 FC 151 [*Gravel* FC] is also instructive on the use of counsel's notes and hearsay principles. *Gravel* FC involved a motion to strike parts of affidavits submitted by the respondent in support of an application for judicial review. Justice Tremblay-Lamer disallowed entire affidavits, finding that the affidavits "constitute[d] hearsay in large part, as they quote[d] statements made at the hearing before the umpire according to their own understanding, and argument…" (at para 25).

[42] *142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636*, [2009] OJ No 2011 (QL), 2009 CanLII 24643 [*142445 Ontario Limited* cited to CanLII], dealt with the extent to which affidavit material is admissible in an application for judicial review of an award of a labour arbitrator. The Ontario Divisional Court's statement on the law regarding admissible affidavit evidence is directly applicable to the factual circumstances here:

> [31] One of the purposes of administrative tribunals is to provide an expeditious and inexpensive method of settling disputes. Often, these proceedings are much less formal than judicial proceedings. In keeping with this objective, a number of tribunals do not transcribe their proceedings – for example, the Ontario Labour transcribe Relations Board, the Human Rights Tribunal of Ontario and labour arbitrators under the Labour Relations Act.
>
> [32] If extensive affidavits can be filed on applications for judicial review in order to permit parties to challenge findings of fact before such tribunals, there would be a significant incentive for parties to seek judicial review since they could then attempt to reframe the evidence that was before the arbitrator. As a result, the process of judicial review is likely to be more prolonged and more costly.
>
> [33] Moreover, there may be real difficulties in trying to recreate the evidence before the tribunal, where the parties have conflicting views as to what has been said. Where there is a dispute about the evidence, the reviewing court will be put in the unfortunate position of trying to determine what the evidence was before the tribunal in order that it can then decide whether the decision was unreasonable. Such a process is unfair to the administrative tribunal and undermines its role as a fact finder in a specialized area of expertise.
>
> [Emphasis added]

[43] The concerns articulated in *142445 Ontario Limited* arise here: the parties have conflicting views as to what was said and what occurred at the hearing. The role of this Court is

not to re-weigh the evidence from the hearing based on subjective affidavits that this Court has no way of verifying.

[44] As set out in *Access Copyright* at paragraph 20, for this Court to accept any new evidence, it must fit in one or the exceptions to the rules. In this case, some of the affidavits contain new evidence but more importantly they are inadmissible on many other grounds. Even though the parties are relying on these affidavits to show bias, the evidence must still be admissible and not violate other evidence rules. I will exercising my discretion on an individual affidavit basis.

(3) Application

(a) *Stefanie Baker's Affidavit*

[45] Most problematic is the Affidavit of Stefanie Baker, a legal assistant not present at the hearing, sworn September 1, 2021. As the Respondent highlights, the legal assistant has no way to attest to the veracity or completeness of the exhibits, especially those notes that are purported to be contemporaneous notes from the hearing. It appears that the Applicant's counsel have used Ms. Baker as a work-around of Rule 82, thereby still allowing counsel to provide their views on the hearing. The Court does not look kindly on affidavits of counsel or their staff that relate directly to "contentious issues of substance" (*Bell Helicopter Textron Canada Ltee v Eurocopter*, 2013 FCA 261 at para 19).

[46] Professional conduct of most Canadian Law Societies also factors into the determination if the lawyer or their staff become part of the fray. Descending into the fray opens counsel up to cross examination, where they then present argument at the hearing. This is a breach of Rule 82: "A person cannot act as a witness and a lawyer at the same time" (*Twinn v Poitras*, 2011 FCA 310 at paragraph 87. Generally, if such a situation arises, counsel removes themselves or their firm from the file.

[47] The exhibits in Ms. Baker's Affidavit that deal with notes from the hearing are double hearsay, which is a violation of Rule 81.

[48] Parts of the notes have questions that are blank, while other parts are filled in. The cross-examination of the Respondent on March 10, 2022, demonstrates that the Applicant's own counsel is unsure as to the form of some of the notes provided. When counsel for the Applicant asked the Respondent to look at Ms. Baker's Affidavit, the following exchange occurred:

> [Respondent]: Excuse me. I'm reading this document, and on some of these questions, there isn't no answers attached to them.
> Mr. Rolf [Counsel for Applicant]: I guess there was no question -- maybe the question wasn't -- I don't know. The question probably wasn't answered, and there was no answer given -- wasn't asked, no answer given.

[49] It's entirely unclear whether the questions were asked and not answered, never asked, or perhaps the questions were asked and counsel did not fill in the response. There is no way of knowing. If the Applicant's own counsel is also unsure, it is unclear how the notes are of any probative value to this Court.

[50] The notes themselves lack objectivity. An example best demonstrates why the notes of the lawyers are not objective. Exhibit D of Stefanie Baker's Affidavit contains notes from Benjamin R. Young, co-counsel for the Applicant. In response to the Respondent's testimony, Mr. Young has written:

> SHE IS SO VENOMOUS TO CHIEF THAT SHE CAN'T EVEN REFER TO THE CHIEF AS "CHIEF" IN A HEARING!
>
> TEHRE IS NO WAY THAT JW IS GOING TO PRINT OFF AND TAKE SCREENSHOTS LATE AT NIGHT AND SEND TO HIMSELF AT 757AM AND NOT ATTACH THEM?!

[51] The hearing notes provided via affidavit are therefore, in my view, of very little (if any) probative value and are not reliable evidence. I agree with the Respondent that the "specific opinions given amount to a tautology" and the evidence is a subjective interpretation of the hearing.

[52] In having their staff file the affidavit, the Applicant has shielded the lawyers' notes from cross-examination. A cross-examination of Ms. Baker would do nothing to aid the Respondent in its arguments, nor would Ms. Baker be able to speak to the contents of the notes, since she was not present in the hearing. Although some of the exhibits contain the dates they were allegedly taken on, there is no way to verify this.

[53] For these reasons, the following Exhibits from the Affidavit of Stefanie Baker are struck in their entirety:

Document	**Exhibit**

Affidavit of Stefanie Baker sworn September 1, 2021	**Exhibit A** Notes of the testimony of Chief Robin McGinnis from October 26 and 27, 2020, taken by Sanjana Ahmed, co-counsel for RRFN
	Exhibit B Notes of the testimony of former Councillor Shawn Brown from October 28, 2020, taken by Sanjana Ahmed, co-counsel for RRFN
	Exhibit C Notes of the testimony of Lauren Hyatt from October 28 and 29, 2020, taken by Sanjana Ahmed, co-counsel for RRFN
	Exhibit D Notes of the testimony of Ms. Bombay, from her direct examination from February 24, 2020 and March 16, 2021, taken by Benjamin R. Young, co-counsel for RRFN
	Exhibit E Notes of the testimony of Ms. Bombay, from her cross-examination on March 16 and17, 2021, taken by Benjamin R. Young, co-counsel for RRFN.
	Exhibit F Notes of the testimony of Verna DeBungie from March 17, 2021, taken by Benjamin R. Young, co-counsel for RRFN
	Exhibit G Notes of the testimony of Jeremiah Windego from February 23 and 24, 2021, taken by Benjamin R. Young, co-counsel
	Exhibit H Notes of the supplemental testimony of Chief Robin McGinnis from February 23 and 24, 2021, taken by Benjamin R. Young, co-counsel for RRFN

(b) *Affidavit of Chief Robin McGinnis Sworn September 2, 2021*

[54] Portions of Chief McGinnis's affidavit are argumentative and opinionated. Paragraphs 18 through 23 argues the issues from the Liability Decision and attempts to explain how the Adjudicator was biased. These are not factual assertions and is an attempt to argue a reasonable apprehension of bias in the affidavit.

[55] I will assign no weight nor probative value to paragraphs 18 through 23 of Chief McGinnis's affidavit.

(c) *Affidavit of Lauren Hyatt Sworn September 2, 2021*

[56] Ms. Hyatt's Affidavit shares similar problems as Chief McGinnis's Affidavit. Portions of the Affidavit contain argument and opinion. For example, paragraphs 7, 9, and 10 are argumentative and challenge the Adjudicator's findings.

[57] Again, the Applicant cannot establish a reasonable apprehension of bias through opinion evidence from the party who lost at the hearing. There must be more to substantiate such a claim.

[58] For the reasons above, I will assign no weight to Ms. Hyatt's Affidavit. As the Federal Court of Appeal said in *Coldwater First Nation* at paragraph 22, the Court can be trusted to ignore the improper.

(d) *Affidavit of Stacey Bigelow Sworn February 18, 2022, Containing Exhibits A-G*

[59] Stacey Bigelow is a legal assistant employed by the Applicant's counsel. The first two Exhibits, A and B, attach the Decisions. Exhibits C through F provide the volume of documents from the firm's files produced by the Respondent for the hearing before the Adjudicator. Exhibit G provides additional documents and it is unclear whether these were before the decision-maker.

[60] These exhibits would be unnecessary if there had been a CTR. Given there was not, I will accept Exhibits A-F that contain the materials that were before the decision-maker and the Adjudicator's Decisions and I will strike Exhibit G.

(e) *Affidavit of Kathleen Bombay Sworn September 20, 2021, Containing Exhibits A-N*

[61] The Respondent's Affidavit for the most part provides factual assertions and statements. However, some issues arise with respect to the Exhibits.

[62] Similarly, to the Applicant's volumes of documents, it is clear these documents are only admissible to the extent they re-create the CTR (Exhibits A-M). I will give no weight to any opinion evidence or argumentative statements in the Respondent's Affidavit or the exhibits. I will strike Exhibit N as it was not before the decision-maker.

B. *Bias Allegations*

(1) Bias – The Law

[63] Members of administrative tribunals, such as adjudicators, are presumed to have acted fairly and impartially (*Deliva v Canada (Attorney General)*, 2022 FC 693 at para 60). The onus is on the party raising the allegation of bias to demonstrate the conduct through material evidence (*Rafizadeh v Toronto Dominion Bank*, 2013 FC 781 at para 16). It is a high threshold and the grounds for an apprehension of bias must be substantial. *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC) at 372 is the foundational case that established the principle of reasonable apprehension of bias:

> The 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 of "what would an informed person, viewing the matter realistically and practically—conclude?

[64] Most applicable to the facts here, a party cannot raise insinuations or their own impressions. The Federal Court of Appeal highlighted the importance of material evidence in *Arthur v Canada (Attorney General)*, 2001 FCA 223 at paragraph 8 [*Arthur*]: such assertions "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel" [emphasis added].

(2) Waiver

[65] "A person who has waived a right to procedural fairness cannot subsequently challenge an administrative decision on the ground that it was made in breach of the duty of fairness"

(*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 48 citing Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998), at paragraph 11:5500)).

[66] The parties have not directly addressed the question of waiver, although the Respondent indirectly raises waiver without specifically mentioning the principle. The Respondent submits that the "issue of bias was never even raised or mentioned at the hearing" and that the first suggestion of bias arose after the Applicant found out they lost when the Adjudicator's Liability Decision was released.

[67] Though there was an objection during the hearing, it did not pertain to bias. The Applicant's written submissions and Chief McGinnis's affidavit indicates the objection was due to "unfounded, speculative, and redundant line of questioning." The Adjudicator ruled in the Applicant's favour that the line of questioning had gone on long enough. The objection related to the unfairness of the questioning of Mr. Windego and the Applicant was successful in its objection.

[68] During the application hearing, counsel for the Applicant conceded that at no time was bias brought up to the Adjudicator. In fact, it seems an issue of bias was never put to the Adjudicator. As well, a review of the Adjudicator's lengthy Decisions does not note nor raise any bias concerns. I find that bias was not brought to the Adjudicator's attention as soon as possible at the hearing as is necessary per the jurisprudence.

[69] Accordingly, the Applicant has waived the right to raise bias before this Court. This is determinative of the bias and reasonable apprehension of bias arguments raised in this judicial review. But if I am wrong I have dealt with the full arguments below.

(3) Reasonable Apprehension of Bias Submissions

(a) *Applicant Submissions*

[70] The Applicant argued that a reasonable person would find the Adjudicator biased based on her findings. The Applicant raised several examples they said demonstrated actual bias or a reasonable apprehension of bias.

[71] The Applicant alleged that the cross-examination of Mr. Windego on the issue of his payment, which went to his credibility, demonstrates bias. The Applicant submitted that only when it had produced the documents regarding the source of the payment did the Adjudicator finally put an end to the questioning by saying “enough”. It was only when the questioning was irrational and an excessive amount of time spent on Mr. Windego’s payment that the Adjudicator accepted counsel’s objection.

[72] The Applicant also argued that the Adjudicator breached natural justice by failing to consider all of the evidence. In response to the finding made by the Adjudicator of what the Chief said was significant, the Applicant explained that Chief McGinnis said although the July 10, 2019 Facebook post was significant, he also said that the Respondent’s refusal to complete the solar payments for July 10 led to her dismissal. In addition, the Applicant said the Chief

testified about the July 13, 2019 Facebook comment as a factor in the Respondent's dismissal. Relying on *Puxley v Canada (Treasury Board – Transport)*, 1994 CarswellNat 844, 24 Admin LR (2d) 43, the Applicant says the Adjudicator mischaracterized the evidence and this amounts to a breach of procedural fairness.

[73] The Applicant raised the September 13, 2019 letter that counsel for the Applicant sent to the Labour inspector assigned to investigate the complaint. The Applicant maintained that putting this letter to Mr. Windego, who was not the author of the letter, was unfair. Further, the Applicant explained that the letter was not put to any other witnesses. Consequently, the Applicant alleges that the Adjudicator's reliance on this letter is unfair.

[74] The Applicant also noted that even though the Adjudicator rejected the Respondent's attempts to impugn Mr. Windego's credibility, his evidence was still rejected when it was contradicted. This, the Applicant argues, is yet another instance where a "reasonable and informed person" would conclude there is a reasonable apprehension of bias.

[75] The Applicant submitted that the Adjudicator's failure to accept the evidence of Ms. Hyatt is another example that demonstrates a reasonable apprehension of bias. The Applicant explained that Ms. Hyatt's evidence was not simply that the Respondent had not provided her with the membership list but instead that she had to ask multiple times for the information and it was not up to date.

[76] On the bias issue, the Applicant suggests that the Adjudicators treatment of their arguments on the issue of the Respondent not looking for a job from her termination until she went back to school is evidence of bias. The Applicant says the bias is evident because the Adjudicator took “great pains to reject” the arguments on this issue.

[77] The Applicant at the hearing again questioned why the Adjudicator refused to produce her notes of the hearing. The Applicant queried the intentions of the Adjudicator, asking, “what was she trying to hide?” This argument was brought forward again despite the rejection of the production request by both an Associate Judge and a Justice on appeal. As I noted at the outset of this decision, I will not consider this argument any further.

[78] The Applicant concluded their bias arguments with the proposition that because the Remedy Decision is based on the findings of the Liability Decision, it is “equally tainted” and therefore must also be set aside for a reasonable apprehension of bias.

(b) *Respondent Submissions*

[79] The Respondent stated that it is a very serious to make an allegation of bias and yet have no material evidence that demonstrates bias. The Respondent highlights that there is no evidence on the record that supports or even suggests a reasonable apprehension of bias.

[80] The Respondent points to the fact that the Adjudicator repeatedly ruled in the Applicant’s favour throughout the adjudication. The Respondent asserts that several rulings in favour of the

Applicant is proof there was no bias. First, the Adjudicator ruled in the Applicant's favour when the Applicant contested the Respondent's questioning of Mr. Windego.

[81] Secondly, the Adjudicator allowed the Applicant a second opportunity to provide evidence on the mitigation issue, in response to the Respondent's evidence. When she allowed the Applicant to file example jobs, the Adjudicator did not allow the Respondent to cross-examine on it. Again, this is a ruling in favour of the Applicant and cannot be conceived as bias.

[82] The Respondent argued that the Adjudicator's method of dealing with the objection (when she said "enough") at the adjudication hearing was simply a matter of an adjudicator maintaining the order in a contentious tribunal hearing. That does not met the high bar of bias.

(4) Reasonable Apprehension of Bias Analysis

[83] The Applicant's arguments concerning bias and reasonable apprehension of bias fail.

[84] Allegations of bias cannot rest on impressions of an applicant or his counsel (*Arthur* at para 8). Chief McGinnis's Affidavit contains opinion evidence from an interested party that lost at the adjudication. This evidence cannot be used in this situation to establish a reasonable apprehension of bias or breach of procedural fairness. It would appear that the finding made by the Adjudicator was based on the evidence and she gave more weight to his statement of what was the significant factor than to subsequent statements. That is within the purview of the Adjudicator and was not an indicator of bias.

[85] This is not the context that *Yukon Francophone* suggests, nor does it aide this Court in determining whether the Adjudicator was biased. There must be more material evidence than impressions of an unsuccessful applicant to support an allegation of bias, or reasonable apprehension of bias.

[86] I agree with the Respondent's submission that the Adjudicator's response to the objection of Mr. Windego's questioning was an adjudicator maintaining order in her hearing. In this circumstance, that is not evidence of bias. I agree with the Respondent and find the Adjudicator was impartial without unfairness in how she conducted the hearing.

[87] As bias arguments these must fail, given there is no material evidence to show bias or a reasonable apprehension of bias. When these arguments are unpacked, they are really a disagreement with the Adjudicator's findings, the weight she gave to some evidence, and credibility findings. The bar is high to find bias and the Applicant has not met the bar.

C. *Alleged Failure to Consider all of the Evidence*

[88] As I stated earlier, the arguments raised by the Applicant are really a determination of whether the decision is reasonable. Each decision is long and detailed. The Adjudicator set out exactly why she made factual findings and adequately explained her conclusions in her reasons. Whether I would have decided the same way is immaterial.

[89] The Applicant has characterized an alleged failure to consider all the evidence a procedural fairness issue. I disagree. As I understand this issue, this a question of evidence

before a decision-maker and is therefore a substantive issue. Although the requirement to give written reasons forms part of the duty of fairness, analytically, an analysis into the responsiveness of reasons to evidence falls into the substantive category of review. The "evidence before the decision maker and facts of which the decision maker may take notice" is an explicitly enumerated part of the analysis into whether a decision is justified in light of the legal and factual constraints that bear on it: see *Vavilov* at paragraph 106.

[90] Reasonableness assessment is "not a line-by-line treasure hunt for error": *Vavilov* at paragraph 102 citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54. The Applicant has committed this very error by intimately re-raising the factual disputes that were before the Adjudicator.

[91] The Adjudicator's Decisions sufficiently deal with the evidence and submissions of the parties: "a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 citing *Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Assn*, [1975] 1 SCR 382 at 391, 1973 CanLII 191 (SCC)). I agree with the Respondent that the Adjudicator "clearly and comprehensively explained why she accepted the relevant evidence and rejected other evidence." Even the Applicant acknowledges that the Adjudicator took "great pains to reject" their mitigation arguments.

[92] A review of the Adjudicator's Decisions demonstrates cogent reasons that grapple with the central issues in the Respondent's complaint. What the Applicant challenges is the conclusions the Adjudicator reached on the evidence, not a failure to consider the evidence. That is not this Court's role.

[93] Based on the evidence that was before the Adjudicator, the Decisions are reasonable and justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" (*Vavilov* at para 85).

[94] I dismiss the application.

V. Costs

[95] After the hearing, the parties agreed that the costs of this application be fixed in the amount of $12,000.00, inclusive of disbursements and taxes.

JUDGMENT IN T-1210-21

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. Costs of the application, in the amount of $12,000.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1210-21
STYLE OF CAUSE:	RAINY RIVER FIRST NATIONS v KATHLEEN BOMBAY
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 16, 2022
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	OCTOBER 20, 2022

APPEARANCES:

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