Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 3
Date: February 28, 2020
File Number: T2207/2917

Between:

Cecilia Constantinescu

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Background of the Motion

[1] This decision deals with a motion for recusal filed by the Complainant, Ms. Cecilia Constantinescu, on January 17, 2020, asking me to recuse myself from the processing of the complaint.

[2] Correctional Service Canada filed its submissions on February 6, 2020, requesting that the motion for recusal be dismissed for waiver. Alternatively, the Respondent argued that the motion should be dismissed on the grounds that the Complainant has not established the existence of a reasonable apprehension of bias.

[3] The *Canadian Human Rights Commission*, which is not participating in the hearing, did not file submissions in response to Ms. Constantinescu's motion when it had the opportunity to do so.

II. Issues

1) Has the Complainant waived her right to file a motion for recusal?
2) If not, is there a reasonable apprehension of bias on my part requiring that I recuse myself?

III. Preliminary Issue – Waiver

[4] The Respondent is of the view that the motion for recusal should be dismissed on the basis of waiver insofar as the Complainant did not raise a reasonable apprehension of bias at the earliest opportunity.

[5] As I wrote in my decision in *Constantinescu v. Correctional Service Canada*, 2019, CHRT 49 at para 151, this is not the first time Ms. Constantinescu has said that I am not impartial in dealing with her complaint.

[6] In one of her correspondences in the winter of 2018, she said that I was not impartial. The Respondent intervened to denounce her serious remarks. Following this exchange between the parties, I sent a letter to the parties on December 4, 2018. In that

letter, I asked Ms. Constantinescu, among other things, to file a motion for recusal as soon as possible, or to show restraint and refrain from allegations of bias (*Zündel v. Canada (C.D.P.),* 2000 CanLII 16575 (FCA)).

[7] The Complainant did not file such a motion.

[8] A year later, on December 15, 2019, the Complainant requested in another correspondence that another member be assigned to her case as she alleged that I would be biased. Once again, I told her that she had to file a motion to that effect. The motion was filed on January 17, 2020.

[9] The so-called concept of waiver, *forclusion* in French, lies in particular in the common law. In English, it is called “waiver”. This concept refers to the idea that when a party does not raise an objection of bias at the appropriate time, it voluntarily waives the right to raise it subsequently (hence the term “waiver” in English).

[10] Holding in reserve one’s objection as to the bias of the decision-maker during the inquiry can thus be considered as an abusive tactic (holding back tactics). This tactic carries the risk of a finding of waiver: the theory of waiver then comes in response to such tactic, requiring the party to raise bias at the earliest opportunity, as soon as possible. When bias is not raised immediately, the genuineness of the apprehension of bias is thus called into question (*Eckervogt v. British Columbia*, 2004 BCCA 398, at para 48. See also *Transport Car-Fré Ltée v. Lecours*, 2018 FC 1133, at para 50).

[11] Authors Brown and Evans ((Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publications, looseleaf, 2003, at para. 11:5500)) state that the objection of bias is generally deemed to have been waived if the party or their legal representative knew of the elements that could lead to recusal and acquiesced in the continuation of proceedings by not objecting at the earliest opportunity.

[12] The authors go on to say that there is no presumption of waiver if the decision-maker failed to disclose his interests, if a party was prevented by surprise from taking the objection or if the party was unrepresented by counsel and did not know of its right to object at the time. However, if none of these exceptions apply and there is a

significant delay, the genuineness of the reasonable apprehension of bias is questionable, and the principle of waiver may apply.

[13] The Complainant, in her reply, responded to the waiver argument and defended herself for not having filed the motion for recusal earlier. First, she indicated that she was not familiar with the Tribunal's case law and case law research. In addition, she indicated that she had run out of time, had no assistance, had to file several requests in this matter and had to take the time to prepare the teleconferences. She also indicated that for a period of time she was working and had to travel through traffic.

[14] Since November 2019, she said that she has had time to listen to the videotapes of the teleconferences and read the Tribunal's recent jurisprudence, which led her to believe that I was biased.

[15] She added that she believed that the letter that was sent by the Tribunal and dated December 4, 2018 was from the Tribunal's registry and not from the member. For clarification, this letter was sent to the parties as a result of correspondence from the Complainant in which she specifically raised a concern of bias on my part. The letter therefore required her to file an application for recusal as soon as possible, which she did not do.

[16] She stated that she had learned on the November 26, 2019 teleconference that the instructions had come from the member and not from the registrar. She argues that it was this finding that confirmed her fear of bias towards me.

[17] It is difficult to understand how the Complainant could have believed that the December 4, 2018 letter sent from the Tribunal, though signed by a registrar, originated from the registrar. It should be remembered that this letter informed the Complainant that as a result of her comments that I was biased, she had to file a motion for recusal as soon as possible or refrain from making such comments. The letter also sought to realign her unacceptable behaviour in the proceedings.

[18] That being said, the first two lines of that letter read as follows:

> [TRANSLATION]

> […]
>
> Dear Parties,
>
> Please find attached a correspondence from the member:
>
> […]

[19] I think it would have been beneficial to carefully reread the letter of December 4, 2018, since it is crystal clear from the first two lines that these were instructions from me, not from the registrar.

[20] In my view, Ms. Constantinescu cannot rely on her lack of understanding of the 2018 letter to justify the delay in filing her motion. The letter was clear and unequivocal.

[21] And while Ms. Constantinescu is not represented by counsel, she was informed of her obligation to file a motion for recusal in this letter of December 4, 2018. Yet she made the informed decision not to file such a motion.

[22] Further, the Complainant submits that it was not until December 2019 that she was convinced – that she considered – I was biased, which is why she filed her motion for recusal on December 15, 2019. The Complainant's arguments are inconsistent. How can she say that her apprehensions of bias were confirmed only in December 2019, when she had already told the Tribunal about it in December 2018?

[23] In fact, at the end of 2018, the Complainant raised an apprehension of bias on my part, quite clearly. Raising this issue in a correspondence addressed to the Tribunal is sufficient to demonstrate that she already considered having an apprehension of bias at the time.

[24] In this context, since the Complainant raised the apprehension of bias at the time, she should have filed a motion for recusal as soon as possible, as I had asked her to.

[25] She made the informed decision not to file that motion. She cannot invoke her own inaction to obtain what she seeks.

[26] The Complainant again believes that when the Respondent invokes the principle of waiver, this is vexatious, improper, inducive, unrealistic and nonsensical.

[27] As I explained earlier, the principle of waiver is one that exists in law and the Respondent can invoke it to have the motion dismissed. Doing so is not vexatious, frivolous and unfounded, as the Complainant claims.

[28] On the contrary, the Respondent's argument stands, and I am satisfied that Ms. Constantinescu, by her own actions and decisions, has waived her right to file for my recusal. By waiting a year to file her motion, Ms. Constantinescu lost the opportunity to raise my potential bias. By waiting this long, while knowing what she had to do, she tacitly agreed to no longer raise her objection.

[29] In addition, the Respondent provided arguments in response to Ms. Constantinescu's motion. It also presented an alternative, worded as follows: if the Member [TRANSLATION] "[…] finds that the Complainant has waived her right to submit it (the motion) and that he decides to rule on the Complainant's motion so as to put an end to the doubts she raises and her innuendos against him, the Respondent will submit arguments on the merits of the motion".

[30] I believe it is indeed in the best interests of all, including the parties, the public and justice, that I nonetheless deal with the motion for recusal, even though Ms. Constantinescu waived her rights, so that this matter, which has now been raised twice by the Complainant, be definitively determined.

IV. Applicable recusal law

[31] A cornerstone of our judicial system is the existence of a presumption of impartiality on the part of members of a quasi-judicial administrative tribunal. Thus, a member is presumed to act impartially in the exercise of his quasi-judicial functions until proven otherwise (see *Association des employeurs maritimes v. Syndicat des débardeurs, section locale 375 (Syndicat canadien de la fonction publique)*, 2020 FCA 29, at para 5 [*Syndicat des débardeurs, section locale 375*]).

[32] The Supreme Court of Canada recalled in *Wewaykum v. Canada,* [2003] 2 SCR 259, at paras 57 and 58 [*Wewaykum*] that:

> 57 […] public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
>
> 58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. […]

[33] Moreover, impartiality is not synonymous with neutrality. In this regard, the Honourable Justice Bastarache of the Supreme Court wrote in *Arsenault-Cameron v. Prince Edward Island,* [1999] 3 SCR 851, at p. 851, himself quoting the Honourable Justice Cory also of the Supreme Court in *R. v. S. (R.D.)*, [1997] 3. SCR 484, at para 119:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

[34] Hence the test for a decision-maker to recuse himself or herself is whether there is a reasonable apprehension of bias. This criterion was developed in *Committee for Justice and Liberty et al. v. National Energy Board et al.,* [1978] 1 SCR 369, at pages 394 and 395 [*Committee for Justice and Liberty*].

[35] In that decision, the Supreme Court reiterates that:

> […] 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.

[36] It asks the following question:

> […] what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.

[37] Therefore, the question is whether a person would, in all likelihood, believe that the decision-maker, knowingly or unknowingly, will not make a fair decision.

[38] Also in *Committee for Justice and Liberty*, supra, the Supreme Court specified that the grounds for the apprehension of bias must be substantial. Nonetheless, said right-minded, reasonable and informed person does not refer to a very sensitive or scrupulous conscience.

[39] The onus of establishing an apprehension of bias rests with the party raising it. In our case, it is on Ms. Constantinescu.

[40] It is a high presumption, not easily displaced; there is a high burden of proof on the challenging party (*Cojocaru v. British Columbia Women's Hospital and Health Centre,* [2013] 2 SCR 357, at para 22; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25, at para 26; *Wewaykum Indian Band v. Canada* [2003] 2 SCR 259, at para 76). There must be a real likelihood of bias (*Arsenault-Cameron v. Prince Edward Island,* [1999] 3 SCR 851, at para 2).

[41] It has thus been reiterated many times that a reasonable apprehension of bias is fundamentally contextual; it takes into account the whole proceeding (see *R. v. S. (R.D.)*, [1997] 3 RCS 484, at para 141). In other words, the motion for recusal must be assessed on the facts and context of the case before the decision-maker *(Syndicat des débardeurs, section locale 375,* supra, at para 4).

[42] Furthermore, the Federal Court of Appeal recently reiterated, on January 29, 2020, that the principles applicable to bias apply to administrative tribunal decision-makers *(Syndicat des débardeurs, section locale 375,* supra, at paras 5 and 6).

[43] In its decision, the Federal Court of Appeal found that the administrative judge had correctly applied the key principles for recusal. In addition, the Court found that he had correctly applied them to the context and facts of the case before him.

[44] Thus, as the Federal Court of Appeal teaches, despite the fact that the Tribunal is an administrative tribunal, it does not appear to benefit from the flexibility inherent in the administrative context in the application of the fundamental principles relating to recusal. However, as the Supreme Court of Canada noted in *Bell Canada v. Canadian Telephone Employees Association,* 2003 SCC 36, at para 21, the requirements of procedural

fairness, which include requirements of independence and impartiality, may vary for different tribunals.

[45] As a result, not only must the context and facts of each case be considered when analyzing a motion for recusal, but it must also be taken into consideration that the procedural requirements of a tribunal may vary depending on the nature and function of the particular tribunal.

[46] It is with these principles in mind that I will apply the key principles and the analysis developed by the higher judicial bodies, both in terms of the nature and function of our administrative tribunal and the specific context and facts of this proceeding.

V. Complainant's argument as self-represented

[47] The Complainant states at the beginning of her submissions that she is not represented by counsel or a specialist advisor. As a result, she mentions that her motion for recusal may not meet the form and criteria of a motion for recusal.

[48] I will address this argument very briefly.

[49] I note that Ms. Constantinescu is not represented. That being said, it has been repeated multiple times that litigants who decide to represent themselves on their own must not only be familiar with the rules of procedure of the tribunal in which their action is heard, but must also attempt to have some knowledge of substantive law (or sometimes referred to as substantive law) (see, for example, *Bellemare v. Abaziou,* 2009 QCCA 230, at para 7).

[50] The Superior Court of Quebec, in fairly straightforward terms, said:

> [TRANSLATION]
>
> [97] Representing yourself is a right, however, a lawyer it doesn't make you!
>
> [98] The rules of procedure and evidence must be respected by everyone. It should come as no surprise to an unrepresented person who does not follow them that a tribunal would dismiss the application for lack of evidence. Even

> if the law exists, the applicant must still present evidence in accordance with the rules.
>
> (*Droit de la famille* – 101695, 2010 QCCS 3214)

[51] In the present case, a motion for recusal is very serious and the criteria to be applied in the matter are defined by a more than dominant line of case law. The arguments in this motion must be analyzed in light of these criteria, which, in my opinion, are inescapable.

[52] The fact that Ms. Constantinescu is not represented by counsel does not exempt her from discharging her burden in respect of her motion for recusal. And the burden is not less because of her choice not to hire a lawyer or other counsel with the necessary knowledge. To do otherwise would be contrary to the fairness of the judicial process.

[53] I will therefore apply the principles on recusal to the Complainant's arguments as they should be, whether she is represented or not.

VI. Analysis and position of parties

[54] For the sake of efficiency and brevity, and as several of the arguments submitted are not relevant and do not assist me in deciding this motion for recusal, I will only address the arguments of the parties that I consider necessary, essential and relevant to a decision (*Turner v. Canada (Attorney General)* 2012 FCA 159, at para 40 [Turner]).

[55] When I consider the Complainant's submissions, both in her motion and in her reply, there is one main argument that runs through her entire case: the Complainant disagrees with the way in which I have made my decisions and the way in which I am dealing with her complaint.

[56] She believes that my decisions are not made according to "common sense" and that I do not decide her motions impartially.

[57] She relies on various aspects of the case to express her profound disagreement with the way I handle the complaint. Her arguments are as follows:

- She believes that I am not complying with the Tribunal Rules of Procedure;
- She argues that there is a discrepancy between my decisions and those of other members;
- She protested during the teleconferences;
- She does not like the way I deal with the issue of privileges;
- She believes there is a lack of transparency in the case and public proceedings;
- She feels that I am not properly applying the test of arguable relevance;
- She submits she disagrees with the entire decision of December 16, 2019;
- Reserved decisions take too long to be rendered;
- The high number of decisions I have made against her.

[58] Having considered the submissions of the parties, I find that a right-minded, reasonable and informed person, taking each element individually or collectively, would not find a reasonable apprehension of bias on my part.

A. Disagreement with Tribunal's decisions and non-compliance with the rules and principles of case law

[59] The Complainant states that she completely disagrees with the Tribunal's decisions.

[60] Not surprisingly, I find this to be the heart of the Complainant's motion for recusal motion.

[61] In her reply, she reiterated on more than one occasion that she has [TRADUCTION] "[…] evidence that the member has proceeded differently from what is provided for in the Rules and differently from other Tribunal members in other cases […]"

[62] The Complainant cites a few examples where she disagrees with the Tribunal.

(i) Destruction of documents

[63] Ms. Constantinescu disagrees with the manner in which I handled her requests for disclosure of documents destroyed by the Respondent, in particular the notes taken by the investigators during Mr. Durdu's investigation.

[64] She is of the opinion, following her request to that effect, that the Tribunal should have asked the Respondent for evidence that the notes had been destroyed, which the Tribunal did not grant. She believes that the Tribunal's decision is unfounded.

[65] She relies on the decision in *Itty v. Canada Border Services Agency*, 2019 CHRT 31 [*Itty*], in which the member ordered certain measures concerning documents that were allegedly destroyed by the Respondent.

[66] She applies the same reasoning to the audio recordings of certain individuals who were interviewed by the investigators. According to the Complainant, some parts of the recordings are missing. She believes they have been tampered with. She believes that the Tribunal makes decisions lightly and frivolously.

[67] She goes on to apply the same reasoning to the disappearance of a harassment complaint allegedly made against her eventual aggressor in the Respondent's computer system.

[68] Again, she believes the Tribunal should have taken the same measures as in *Itty*, which it did not. She finds that the Tribunal makes decisions with facility and that it has not taken adequate measures in her case.

[69] On the one hand, it should be noted that my colleague's decision in *Itty* based on a specific factual situation that existed in that case at the time the decision was made. I am not bound by the specifics of the measures taken in that case, since decisions on disclosure are necessarily contextual.

[70] While I am bound by the Tribunal's fundamental principles for disclosure (including arguable relevance), it is the factual elements that create the distinction between each case.

[71] When the Tribunal rendered its decisions in this case, following the Complainant's requests, it did so based on the parties' submissions at the time the submissions were presented.

[72] Once submissions are presented by the parties, the Tribunal decides on their basis.

[73] On the other hand, it is clear that Ms. Constantinescu is not satisfied with my decisions, and has not been for quite some time. I noted this situation in my recent decision 2019 CHRT 49 at paras. 100 to 102.

[74] A reading of her motion for recusal indicates that Ms. Constantinescu again takes the liberty of reiterating her disagreement with my decisions. In addition, she uses recently published decisions to raise what she considers to be errors in my decisions, errors which, still in her view, give rise to a reasonable apprehension of bias.

[75] Let me recall that when it comes to recusal, given the strong presumption of impartiality in favour of decision-makers, including those of administrative tribunals, an error, even reviewable, is not sufficient to support a reasonable apprehension of bias. More is needed to meet this heavy burden of proof; the error should not be confused with bias (see, among others, *Protection de la jeunesse – 159253,* 2015 QCCS 6627, at para 49; *Genest v. R.*, 2016 QCCA 1131, at para 43; *R .v. Black*, 2003 NSSC 79, at paras. 12 and 13; *Dorey v. Havens*, 2019 BCCA 47, at para 58).

[76] Finally, despite what Ms. Constantinescu seems to think, this motion for recusal is not intended to challenge any decisions I may have made. It is also not for me to restate the reasons for my decisions. If a party is not satisfied with a decision, it is always open to them to file an application for judicial review in the Federal Court. The motion for recusal is simply not the right medium for this type of application.

(ii) Privilege

[77] Ms. Constantinescu argues that the list of documents for which the Respondent has claimed privilege is not specific enough. In her opinion, the Tribunal did not ask the Respondent to provide a more detailed and up-to-date list.

[78] She considers that the Tribunal should have requested a detailed list immediately and not at the end of the disclosure process. She believes that the Tribunal is not following its rules (in particular Rule 1(1) of the Tribunal's Rules of Procedure (the "Rules")) and has not proceeded in the interests of justice.

[79] She submits that the Tribunal should have proceeded as in *Khouri and Khouri v. Virgin Mobile Canada*, 2019 CHRT 26 [*Khouri*] or as in *T.P. v. Canadian Armed Forces*, 2019 CHRT 14 [*T.P.*] and wonders why she did not receive the same treatment in her case. Thus, she finds that I am not complying with the rules of the Tribunal or the jurisprudence in this regard.

[80] On the one hand, I would point out that in connection with my colleague's decisions in *Khouri* and *T.P.*, the same comments made earlier in paragraphs 68 to 75 apply in this case.

[81] On the other hand, I recall that I am master of my own proceedings and that I have a discretion in the management of the case (*Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560).

[82] In addition, Rule 1(1) of the Rules states that parties must be allowed to make representations in a timely and efficient manner. *Opportun* [French for "timely", in the French version] means "*qui convient dans un cas déterminé, qui vient à propos*" [that which is suitable in a given situation, opportune] (Le Petit Robert*, Dictionnaire alphabétique et analogique de la langue française*, nouvelle édition millésime 2019, Paris, Dictionnaires Le Robert, 2836 pages). We also have to keep in mind that this must be efficient given the case and its context. In the English version, the same rule uses the adjectives *timely and efficient*, which is identical to the French version. *Timely*, not surprisingly, is defined as "opportune; occurring, done, or made at suitable or appropriate time" (Canadian Oxford Dictionary, 2d ed. (Oxford University Press 2004)).

[83] The parties are aware of the reasons why I made my decisions on the list of documents and privileges and this motion is not meant for me to justify myself again.

[84] It should be noted that I did not dismiss Ms. Constantinescu's application: this application (a more detailed list) will be dealt with after disclosure is effected. Once the disclosure is complete, the issue of privileges will be dealt with, as it is timely and effective to do so at that time. When we deal with this issue, the list of documents over which privilege was claimed by the Respondent, and which, according to the Complainant, does not contain sufficient detail, will be addressed.

[85] It should be noted that when the Respondent mentions that a document is privileged, it confirms that the document appears on its Schedule B. In addition, every privilege claimed by the Respondent and each challenge by the Complainant are recorded in the summaries of the teleconferences.

[86] Thus, it is fortuitous that the Complainant should again come back with such a request when I have already specified that this issue will be resolved once the lengthy and complex disclosure is complete.

[87] Once again, Ms. Constantinescu disagrees with this decision and believes that this is an example of bias on my part. That is not the subject of the motion for recusal.

[88] I do not see how my decision to defer this matter to later for reasons already explained to the parties would allow a right-minded, reasonable and informed person to conclude that there is a bias.

(iii) Confidentiality order

[89] The Complainant states that she has offered on several occasions that the disclosure of certain documents be accompanied by a confidentiality order.

[90] She relies on the *Khouri* decision in which my colleague ordered disclosure of documents by the Respondent, while protecting them under a confidentiality order. She considers that the Tribunal should have taken the same measures in her case.

[91] Once again, the same comments made in paragraphs 68 to 72 of this decision apply with respect to my colleague's decision in *Khouri*.

[92] That being said, the decisions I have made considering potential confidentiality orders are based on the submissions presented by the parties at the time they were. I have determined that this was not the way to go in our case. The purpose of this motion is not for me to justify my decisions again.

[93] I might add that confidentiality orders are not a magic cure-all. The conditions for obtaining a confidentiality order are clearly set out in the *CHRA* and I do not believe that the Tribunal should order confidentiality without serious reasons.

[94] Having said that, a right-minded, reasonable and informed person would not conclude that this aspect demonstrates a reasonable apprehension of bias on my part.

(iv) Test of arguable relevance

[95] The Complainant disagrees with the Tribunal's decisions on the arguable relevance of certain documents. She adds that the Tribunal did not ask the Respondent to provide an affidavit or evidence establishing that certain documents do not exist when it should have.

[96] She relies, among other things, on Philps v. Ritchie-Smith Feed Inc., 2019 CHRT 43 (Tribunal Chairperson David L. Thomas and not Member Harrington, as noted by the Complainant) as well as T.P., supra. In her opinion, I am not authorizing as extensive a disclosure as in these files.

[97] The comments made in paragraphs 68 to 72 of this decision are still applicable.

[98] That being said, it is true that arguable relevance is assessed on a case-by-case basis. Arguable relevance is necessarily contextual, and after hearing the parties and considering their submissions at the time they were presented, I must decide the matter.

[99] The Complainant adds that following several of my decisions refusing the disclosure of documents, I told her that she would have the opportunity to examine the witnesses on this issue. She does not agree with that answer since she wants to have access to the documents she is asking for, not to examine the witnesses.

[100] Indeed, when the Complainant is looking for information and not documents, it must be concluded that it is the witnesses who will be able to provide the answers she is looking for. I will not dwell upon this argument any further since I have dealt with this issue on several occasions during the teleconferences and also in my decisions, including in my decisions 2018 CHRT 8, at paras 17 and subsequent and 2019 CHRT 49, at paras 57 and 58.

[101] Now, it is clear that the Complainant does not agree with my decisions and my conclusions on the arguable relevance of documents.

[102] Once again, a right-minded, reasonable and informed person would not conclude that these elements support a reasonable apprehension of bias on my part.

(v) Respondent's general response

[103] In response to the many arguments raised by the Complainant regarding her dissatisfaction with my decisions, the Respondent replies that Ms. Constantinescu is acting as a very sensitive and scrupulous conscience.

[104] It is of the opinion that the Complainant's arguments were not based on facts or the context of the case. It adds that the Complainant is not attacking my integrity as a member, but rather my decisions, with which she disagrees, based, among other things, on what other members have decided (the Respondent cites *Hernandez Victoria v. Canada (Citizenship and Immigration),* 2009 FC 388, at para 32).

[105] The Respondent is of the view that an informed person, knowledgeable about the context of the complaint, viewing the matter realistically and practically and having thought the matter through, would not conclude that there is an apprehension of bias on my part.

(vi) Conclusion

[106] The Complainant establishes a connection with the fact that other members, in different cases, have, in her view, made different decisions from mine. In doing so, she believes that these members would be impartial, and not I.

[107] The Complainant's argument, taken another way, is that since I did not order what she requested or what she expected me to order, and that other members have purportedly ordered certain measures in other cases that she would have liked me to order, then I am biased in dealing with her complaint.

[108] Decisions are rendered taking into account the context of the case, the facts, and the submissions of the parties. Orders are issued on the basis of what is presented. The Complainant simply does not agree with the way I handle the case. She does not agree with my reasons or my decisions.

[109] The relation she is trying to establish between her dissatisfaction and my alleged impartiality is unfounded and does not support her motion for recusal. A right-minded, reasonable person who is informed about the case and its context would not conclude that there is an apprehension of bias on my part based on this element.

B. Decision of December 16, 2019

[110] Ms. Constantinescu claims that my decision of December 16, 2019, in which I dismissed her motion to amend 17 interlocutory decisions, having found it to be an abuse of process, supports her motion for recusal. She adds that it was the Tribunal that had ordered her to file her motion.

[111] The Respondent is of the view that the language I used in my decision regarding the Complainant's vexatious behaviour, while firm, does not raise a reasonable apprehension of bias either. It argues that my decision is a corollary response to the Complainant's unacceptable conduct and that in behaving so, she should expect a strong response from the Tribunal (see *Agnaou v. Canada (Attorney General)*, 2014 FC 850 at paras 84 and 85).

[112] It is important to analyze the facts in their context. It should be noted that it was the Complainant herself who sent a request on August 28, 2019, in which she announced that she was seeking an amendment to the Tribunal decisions. She had asked how she should proceed and that if the Tribunal required her to proceed by filing a motion, to inform her accordingly.

[113] As her correspondence lacked precision, the Tribunal asked her to file a detailed motion to that effect and gave time limits to the parties for handling this motion.

[114] The Tribunal's instructions arise only from the Complainant's request dated August 28, 2019, and no more. And the Tribunal found that her motion, which was filed on September 27, 2019, and contained all the details necessary for a decision to be rendered, constituted an abuse of process.

[115] A right-minded, reasonable and informed person would not conclude from that fact that there is a reasonable apprehension of bias on my part.

[116] On the other hand, the Complainant is of the opinion that my decision of December 16, 2019, in which I stated that the motion to amend 17 Tribunal decisions constituted an abuse of process, supports the idea that I would be biased. She adds that the decision was sent the day after her request for information on the procedure to follow to ask for my recusal. As such, she considers there is a link between the decision and her request, believing that my decision is punitive, which supports a reasonable apprehension of bias.

[117] These innuendoes are baseless and attack the very foundations of the administration of justice.

[118] The Tribunal distributes its decisions when decisions are issued and ready for distribution. The decision of December 16, 2019 was ready for distribution on December 16, 2019, quite simply. There is nothing further to add on this point.

[119] On the other hand, my ruling declaring an abuse of process is in response to the Complainant's abusive motion as well as her vexatious behaviour in the matter. I will not go back over the reasons since my decision speaks for itself and the conduct leading up to that decision is recorded in it.

[120] The Complainant does not agree with my decision, and that is again the focus of her argument. She must take responsibility for her actions in the case and their potential impact.

[121] A right-minded and reasonable person who is informed about the case and its context would not conclude that this element establishes a reasonable apprehension of bias.

C. Protest during the December 18, 2019 call

[122] The Complainant states that in two teleconferences, on November 26 and December 18, 2019, between the Tribunal and the parties, she protested against my decisions by not actively participating in the call. She feels that I made my decisions lightly and that I accepted with serenity the fact that she was protesting.

[123] The Respondent, for its part, believes that it was following a series of my decisions regarding the Complainant's applications for disclosure that the latter decided not to participate in the teleconference, in protest.

[124] It states that I gave the Complainant the opportunity to make representations in support of her applications for disclosure, which is in keeping with my obligation as a member.

[125] The Respondent goes on to say that, on the contrary, if I had yielded to the Complainant's protests, it could indeed have raised a reasonable apprehension of bias. According to it, I remained neutral, as I had to.

[126] I do not intend to belabour the point. Suffice it to say that when I ask the parties to join a teleconference to deal with disclosure issues, the parties are informed. They know where we are in the processing of applications. The parties have an obligation to arrive prepared for the calls.

[127] When I need additional information in order to make a decision, I ask the parties to provide me with the requested information. If a party does not join the call, has no other comments to add, refuses to answer or leaves the call, the party must accept responsibility for its actions and accept the potential consequences, which are that the member will have to decide with the information in his or her possession.

[128] In the present case, during these teleconferences, I gave the Complainant the opportunity to make representations when I requested additional information. This opportunity was given to her, which is consistent with the spirit of the CHRA, the Rules and procedural fairness. However, she declined to provide further information and it was her choice to do so.

[129] The burden of demonstrating the arguable relevance of the documents that the Complainant is requesting rests on her shoulders. By refusing to provide further details as I requested, she was unable to meet her burden and some applications were dismissed.

[130] The proceedings must continue, and this kind of tactic on the part of the Complainant is frustrating and dilatory. As I mentioned in my 2019 CHRT 49 decision, at para 148, my role is to remain above the fray and to deal with the matter with serenity, despite the mood of the parties.

[131] A right-minded, reasonable and informed person cannot conclude that this element demonstrates a reasonable apprehension of bias on my part.

D. Transparency in the case and public proceedings

[132] The Complainant considers that the Tribunal does not allow her to share the progress of her case with third parties.

[133] For example, she asked the Tribunal in early December 2019 if she could forward the audio recordings of the teleconferences to third parties. The Tribunal responded to this request in the same way it had responded to the applications in 2018, leading to two correspondences on this subject (in March and April 2018): the teleconference recordings are not public and cannot be distributed.

[134] She relies on *Lafrenière v. Via Rail Canada Inc.,* 2017 CHRT 9 [*Lafrenière*], which states that the recordings of the proceedings are public.

[135] It is very difficult to understand the link the Complainant is trying to establish between a reasonable apprehension of bias, and the transparency in the case and the publicity of judicial proceedings.

[136] That said, as I mentioned earlier, I am not bound by my colleague's decision in *Lafrenière*. And I will not take a position on that decision either, because I am not the member who heard that case.

[137] Nevertheless, I note that the issues of publicity of the recordings in my colleague's case were not central to the issue before her. Thus, it seems that the analysis on the issue of recordings did not need to be developed in depth.

[138] It is true that the recordings of the hearings are public, just as a member of the public may attend our hearings in person.

[139] On the other hand, the Tribunal has decided that recordings of teleconferences are not public. That is the position of the Tribunal, and the parties have been informed of it on more than one occasion.

[140] This is no different from the position of the Federal Court itself and its *Policy on Public and Media Access*, which states that pre-hearing conference recordings are not public.

[141] It says that:

> Public and media access to the Federal Court
>
> Hearings of the Federal Court, other than pre-trial or dispute resolution conferences, are generally open and accessible to the public and media, as are documents filed in Court. Specific exceptions relate to confidentiality orders, notably regarding commercial secrets in intellectual property cases and personal information in refugee cases. […]

[142] A right-minded, reasonable and informed person cannot conclude to a reasonable apprehension of bias because I have reiterated the Tribunal's position to that effect.

[143] In addition, Ms. Constantinescu adds that she wants the public to have access to all the documents and recordings in her case, and not only to the decisions made by the Tribunal, which represent only part of the proceedings.

[144] She believes that the decisions do not contain the details of her applications, arguments, teleconferences, correspondence and letters to the Tribunal. She feels it is unfair that the public does not have access to this information.

[145] All of these elements are unrelated to the existence of a reasonable apprehension of bias on my part.

[146] The Complainant seems to be confusing several elements. First, if a party files a motion, the Tribunal renders its decision based on the submissions presented in that motion as well as the documents attached to support its claims. It is the responsibility of the parties to ensure that they make the necessary, complete, and sufficient representations in support of their motion in order to discharge their burden.

[147] The public may have access to the parties' written representations that led to the member's written decision. A member of the public may apply to the Tribunal for access to the written representations.

[148] Second, the Complainant's argument that the decisions do not contain all the details and the parties' arguments is also not helpful. It is recognized that a member does not have an obligation to deal with the parties' every argument.

[149] In this regard, the Federal Court of Appeal stated, in *Turner*, supra, at para 40:

> [40] First, an administrative tribunal need not address each and every argument made. As noted by Dickson J. in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.,* 1973 CanLII 191 (SCC), [1975] 1 SCR 382, at p. 391: "A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. […]"

[150] The Tribunal thus considers the essential elements deemed relevant to its decision.

[151] The Tribunal also does not make public the parties' correspondence, submissions, letters or correspondence to the Tribunal. These items are simply not made public, although some elements are available if requested by a member of the public.

[152] In addition, it should be noted that not all documents in a case are accessible to the public. For example, documents that are exchanged during the disclosure process have a special status.

[153] Documents that have been disclosed in court proceedings, such as the Tribunal's, are governed by a well-established common law principle, that of the **implied undertaking of confidentiality**.

[154] This rule restricts the use of documents that have been disclosed to the sole purpose of the proceedings in question. More clearly, a party who received documents at the stage of communication, disclosure, discovery, etc., is **deemed** to have given an undertaking to the Court that said documents will not be used for any purpose other than the judicial proceedings for which they were produced. The use, even ulterior, of these documents for other purposes can constitute a contempt of court (*Seedlings Life Science Ventures LLC v. Pfizer Canada Inc.,* 2018 FC 443, at para 3).

[155] However, when documents are filed as exhibits at the Tribunal hearing, they necessarily become public unless a confidentiality order is preventing their distribution (subsection 52(1) CHRA). In that respect, a member of the public may file an application with the Tribunal to have access to it.

[156] The fact that Ms. Constantinescu does not agree with these various clarifications and my decisions on this matter does not lead to the conclusion that there is a reasonable apprehension of bias on my part. A right-minded, reasonable and informed person would not come to that conclusion.

E. Number of decisions dismissed

[157] The Complainant argues that my decisions favour the Respondent and that, given the fact that I refuse most of her requests, there is a reasonable apprehension of bias.

[158] The Respondent points out that the Federal Court recognized that if a decision-maker consistently finds in favour of the Department of Justice, this may be

justified by the fact that the applicant's arguments were largely unfounded (see *Agnaou*, supra).

[159] It adds that the Complainant filed her motion for recusal following a series of recent Tribunal decisions, which determined that the documents requested by the Complainant were not arguably relevant. The Respondent is of the view that the documents sought were indeed not relevant and notes that it was as a result of these decisions that the Complainant refused to participate in the teleconference, in protest.

[160] I do not intend to dwell at length on that subject. At the risk of repeating myself, the purpose of this motion is not to yet again justify my decisions. My decisions are supported by the context, the facts of the case and the submissions of the parties.

[161] If a party is not satisfied with my decisions, as I have said many times, it is open to that party to apply for judicial review.

[162] A right-minded, reasonable and informed person who is familiar with the case and its context cannot conclude that this element raises a reasonable apprehension of bias.

F. Timeliness of the reserved decisions on disclosure

[163] The Complainant believes that the fact that I have not yet ruled on six applications for disclosure though they were filed in 2019 shows that I am biased in the case.

[164] In early 2019, the Tribunal asked the Complainant to file a series of applications for disclosure while continuing to advance the case by means of teleconferencing. The Parties were informed of the reasons why I made this decision, with a view to speeding up the management of the case.

[165] It is important to set the record straight. On the one hand, it was understood that I would deal with the six applications in one single written decision. The Complainant's final reply relating to the last application was received on May 20, 2019. It is true that June, July and August are summer months, and the work of the Tribunal may slow down.

[166] That does not mean that the proceedings were stopped. On the contrary, the teleconferences continued and I ruled on a multitude of other applications for disclosure. There was and still is, in my opinion, no immediate hurry.

[167] Then, on August 28, 2019, the Complainant filed an application for the Tribunal to reconsider a series of previous Tribunal decisions. It transpired from her submissions that a number of these applications concerned motions that were still being considered by the Tribunal.

[168] I therefore suspended the processing of the six applications to avoid duplication of decisions. The Parties were informed of this decision.

[169] The Complainant's detailed motion regarding the amendment of decisions was filed on September 27, 2019 and the reply was received on October 21, 2019. My decision was communicated to the parties less than two months later, on December 16, 2019. Once this decision issued, I informed the Parties that my decision on the six motions would be rendered no later than the end of January 2020.

[170] On January 15, 2020, the Respondent requested a stay of the processing of the decision on the six applications for disclosure, as the Complainant had confirmed that she wanted to file a motion for recusal. In light of the submissions by the parties, I granted that stay.

[171] On January 17, 2020, the Complainant filed her motion for recusal. I therefore had to process this application before deciding on the other six motions.

[172] The Complainant's allegation that I conducted the inquiry in such a way as to prevent the file from progressing by not rendering the six decisions without delay is unfounded.

[173] The Complainant's arguments are not consistent with the facts and context of the case.

[174] A right-minded, reasonable and informed person knowledgeable about the context of the proceedings and all the steps that have been taken with the complexity and

impressive multiplicity of the applications made, would not conclude that this element supports a reasonable apprehension of bias on my part.

VII. Conclusion on the motion for recusal

[175] Considering the foregoing reasons, a right-minded, reasonable and informed person, knowledgeable about the facts and context of the case, having thought the matter through, and who is not a very sensitive and scrupulous conscience, would not conclude that the elements raised by the Complainant, taken collectively or in isolation, demonstrate a reasonable apprehension of bias on my part.

VIII. Decision

[176] For all these reasons, I dismiss the Complainant's motion.

Signed by

Gabriel Gaudreault
Member of the Tribunal

Ottawa, Ontario
February 28, 2020

Canadian Human Rights Tribunal

Parties of the case

Tribunal record: T2207/2917

Style of cause: Cecilia Constantinescu v. Correctional Service Canada

Date of the Tribunal's ruling: February 28, 2020

Motion dealt with in writing without appearance of the parties

Written representations by:

Cecilia Constantinescu, for the Complainant

Paul Deschênes and Patricia Gravel, for the Respondent