Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Évelyne Malec. Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Germaine Méténapéo, Estelle Kaltush

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Conseil des Montagnais de Natashquan

Respondent

Ruling

Member: Michel Doucet
Date: April 11, 2012
Citation: 2012 CHRT 8

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[1] This is a motion for adjournment pending the Federal Court's decision on an application for judicial review. The application for judicial review in question was filed by the Respondent with respect to a decision of the Chairperson of the Canadian Human Rights Tribunal assigning the file to me as Member.

I. The Facts

A. The original decision

[2] On January 27, 2010, as a Tribunal member, I rendered a decision in *Malec et autres c. Conseil des Montagnais de Natashquan*, 2010 TCDP 2 (*Malec*). In that case, the Complainants, all employees at Uauitshitun School, in Nutashkuan, claimed to be victims of discrimination under policies related to isolated post allowances offered to certain school employees and implemented by the Conseil des Montagnais de Nutashkuan, the Respondent.

[3] From 1990 to 2007, the isolated post allowance policy applied to "teaching staff with at least a bachelor's degree and to professional employees with the same level of education". In 2007, the isolated post allowance policy was amended and since then has applied to employees who are not residents of Nutashkuan. The Complainants are all Aboriginal, and residents of Nutashkuan. They never received the isolated post allowance, either under the policy that was in effect from 1990 to 2007, or under the policy that has been in effect since 2007.

[4] Ultimately, in my decision, I stated that the Complainants had been adversely differentiated against by the policy that had been in effect prior to 2007, as it made no distinction between resident and non-resident employees. In arriving at my decision, I applied the test set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 SCR 3 [*Meiorin*] which calls for a two-step analysis:

(1) Is there *prima facie* case of discrimination?

(2) In the affirmative, is the prohibited ground of discrimination justified?

[5] The first issue regarding whether there was *prima facie* case of discrimination was answered in the affirmative since the Aboriginal teachers at Uauitshitun School did not receive the isolated post allowance that was nonetheless given to the non-Aboriginal teachers living in Nutashkuan. With respect to the second step, I found that: "[t]he Respondent did not submit any evidence to the Tribunal that justified why the allowance was not paid to Innu teachers at Uauitshitun School" (*Malec* at para. 41).

B. The Federal Court decision

[6] On December 23, 2010, the Federal Court issued its decision in a judicial review of the decision in *Malec* (*Conseil des Montagnais de Natashquan v. Malec*, 2010 FC 1325 (*Conseil des Montagnais*)). Madam Justice Tremblay-Lamer allowed the application, set aside the Tribunal's decision and referred the matter back to "a member or panel of the Canadian Human Rights Tribunal for redetermination in accordance with" the reasons for her decision (*Conseil des Montagnais* at p. 15).

[7] The reasons in Madam Justice Tremblay-Lamer's decision deal with the second part of the test in *Meiorin*, namely, the treatment of the evidence adduced to show that the prohibited ground of discrimination was justified. Specifically, the judge states at para. 32 to 36:

> it is not true that the employer failed to submit any evidence to justify the isolated post allowance policy. The Tribunal failed to take into account the testimony of André Leclerc, the former principal of Uauitshitun School. … during his testimony, when explaining the purpose of the isolated post allowance, Mr. Leclerc stated:
>
> [Translation]
>
> … it is to bring in staff in the hope that they would stay …
>
> The Tribunal, without a valid reason, also failed to assign any probative value to Ms. Malec's admission, during cross-examination, that her spouse, who was non-

> Aboriginal but living in the community, had received an isolated post allowance because he had been living outside the community at the time he was hired...
>
> Nor did the Tribunal examine the statement by Geneviève T. Néashit, an Aboriginal who acquired her status through marriage, who explained that she received the allowance because she lived outside the community …
>
> The Tribunal should have considered all of the testimony …
>
> It is one thing to say that a piece of evidence is insufficient to overturn a *prima facie* case of discrimination, but it is quite another to completely ignore, as is the case here, the evidence of bona fide justification that had been submitted. The Tribunal should have taken the applicant's explanations into account and then decided whether, under the applicable case law and having considered the totality of the evidence, these explanations were sufficient to overturn the *prima facie* case of discrimination.

[8] Finally, given that the Federal Court had referred the matter back to the Canadian Human Rights Tribunal, on March 7, 2011, the Tribunal's registry requested written submissions from the Complainants, from the Respondent and from the Canadian Human Rights Commission in order to establish the procedures to be followed in the rest of the case.

C. The procedures subsequent to the judicial review

[9] In response to the Tribunal's request, the Complainants and the Canadian Human Rights Commission argued that there was no need for further evidence and that the matter should be heard by the same Member. By contrast, the Respondent requested that a new member or panel be assigned to the file and that the parties be allowed to adduce their evidence once again.

[10] On September 29, 2011, the Tribunal's Chairperson issued her decision regarding the procedures to be followed. She assigned the file to me "and [gave me] discretion to determine [my] own procedure" (*Malec et al v. Conseil des Montagnais de Natashquan*, Ruling, Docket T1318/4808, September 29, 2011, at para. 13).

[11] On October 26, 2011, the Respondent filed an application for judicial review of the Tribunal Chairperson's decision (Federal Court docket number T-1740-11). On February 16, 2012, the Respondent filed a notice of motion with the Tribunal requesting the adjournment of the proceeding before the Tribunal pending the Federal Court's decision on its application for judicial review.

II. The Parties' Submissions

A. The Respondent

[12] In its arguments, the Respondent did not cite any case law in support of its motion for adjournment, but seemed to rely on the tripartite test set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 SCR 311 (*MacDonald*) and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110 (*Metropolitan Stores*).

[13] Regarding the first criterion for obtaining an adjournment, the Respondent argues that there is a [translation] "*prima facie* case" since the appointment of this Member, in its view, gives rise to a reasonable apprehension of bias. The Respondent contends that [translation] "comments made" by the Tribunal member in his decision are cause enough for this reasonable apprehension of bias, and thus concludes that having the same Member determine the matter would risk violating the principles of natural justice and procedural fairness.

[14] The Respondent further submits that the continuation of the proceeding pending the Federal Court decision would cause it irreparable harm. Among other things, the Respondent claims that this could lead it to disclose evidence that would be detrimental to it if at any future second hearing. The Respondent argues that holding a hearing before the Tribunal would result in it incurring additional legal expenses and, finally, that it could be compelled by the Tribunal to pay the Complainants sums of money that would be difficult to recover in the event that the Federal Court were to rule in its favour.

[15] Lastly, the Respondent maintains that the balance of convenience lies in its favour, but fails to provide any specific basis on which to justify this claim.

B. The Canadian Human Rights Commission

[16] For its part, the Canadian Human Rights Commission (Commission) opposes the Respondent's motion.

[17] According to the Commission, the Tribunal should apply a different test than the one set out in *MacDonald* and *Metropolitan Stores*. In its view, since the *Canadian Human Rights Act*, RSC 1985, c H-6 (Act) does not expressly grant the Tribunal the authority to adjourn a proceeding, the Tribunal cannot do so unless the lack of an adjournment would result in a denial of natural justice under section 48.9 of the Act.

[18] In the Commission's opinion, holding a new hearing before the same Member raises no reasonable apprehension of bias. The Commission noted that there is a presumption that the trier of facts is impartial. According to the Commission, this presumption can only be rebutted by solid facts and not suspicions.

[19] Thus, in the Commission's view, since there is no reasonable apprehension of bias, the adjournment sought is not warranted under any principle of natural justice.

C. The Complainants

[20] The Complainants concur with the Commission's reasons. They further emphasize the delays already incurred and call for an expeditious disposition of the matter.

D. Respondent's reply

[21] The Respondent, in response to the Commission's arguments, maintains that the Tribunal has jurisdiction to rule on a request for adjournment pursuant to Rules 3(1) and 1(6) of the *Canadian Human Rights Tribunal Rules of Procedure* adopted under the Act. The adjournment of a proceeding before the Tribunal is therefore, in the Respondent's view, not limited to cases in which there has been a denial of natural justice.

[22] The Respondent confirms that the comments made by the Tribunal member in *Malec* and quoted by Justice Tremblay-Lamer in *Conseil des Montagnais* are the only facts alleged and that they provide a sufficient basis for a reasonable apprehension of bias.

[23] Lastly, the Respondent claims that the Commission should not intervene in this motion. According to the Respondent, if the Commission wishes to intervene, it should [translation] "take up the cause" for the Complainants. Otherwise, it should not intervene because it did not intervene at the hearing before the Tribunal. The Respondent did not cite any authority in support of this conclusion.

III. Analysis

A. Request for adjournment: applicable test

[24] In order to dispose of this motion, I must first determine the appropriate test to be applied in cases where an adjournment is requested. As the Commission pointed out, there are two schools of thought that emerge from the case law of the Tribunal in this regard.

[25] On the one hand, some decisions apply the criteria set out in *MacDonald* and *Metropolitan Stores*. Thus, in *Laurendeau v. Canadian Broadcasting Corporation*, 2004 CHRT 11 (*Laurendeau*), a motion for adjournment was filed pending judicial review of a

preliminary objection regarding the Tribunal's jurisdiction. The Tribunal explained the preferred approach in that decision:

> To be granted an adjournment, the respondent had to demonstrate that its application met the three criteria affirmed in … *Metropolitan Stores* and in … *MacDonald* … as follows:
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> a) First, the respondent must establish that there is a serious question to be tried.
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> b) Second, the respondent must convince the Tribunal that it would suffer irreparable harm if the remedy were refused. The term "irreparable" refers to the nature of the harm rather than the extent.
>
> c) Third, which is the balance of convenience, involves determining which party would suffer greater harm from the granting or refusal of the adjournment. (At para. 14.)

[26] The same approach was also taken in *Canadian Telephone Employees' Association et al v. Bell Canada*, 2002, No. T503/2098. In that case, a motion for adjournment had been filed while a related decision regarding the Tribunal's impartiality and institutional independence awaited a ruling on an application for leave to appeal the matter to the Supreme Court of Canada. The motion for adjournment was dismissed, the Tribunal having applied the test set out in *MacDonald* and *Metropolitan Stores* in its decision.

[27] On the other hand, a second school of thought in the case law holds that the Tribunal has the authority to grant an adjournment only where there would otherwise be a denial of natural justice. In *Léger v. CN*, 1999, No. T527/2299 (*Léger*), an application for judicial review was filed challenging a decision of the Commission to refer a complaint to the Tribunal. In that case, the Respondent had asked the Tribunal to adjourn the proceeding until the Federal Court had ruled on its judicial review application. When it dismissed the motion, the Tribunal refused to apply the criteria set out in *MacDonald* and *Metropolitan Stores* by establishing a distinction between the powers of an administrative tribunal and those of a supervisory court:

> The R.J.R. MacDonald tests apply to a different situation, namely, where a supervisory court is asked, pursuant to its statutory authority or its inherent jurisdiction, for interim injunctive relief. In my opinion, the exercise of the Tribunal's discretion is subject to the rules of procedural fairness and natural justice, and the regime of the Act. …
>
> As a response to section 2 [of the Act], numerous court decisions have established that allegations of discrimination are to be dealt with expeditiously and in a timely fashion. It is against this backdrop that … adjournment request must be measured (at para. 5).

[28] In other words, since no power of adjournment is specified in the Act and since the purpose of the Act is to deal with complaints of discrimination expeditiously, only in matters of procedural fairness and natural justice would the Tribunal be allowed to exercise its discretion to grant an adjournment of a proceeding.

[29] In *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 (*Baltruweit*), the Commission had referred a complaint to a conciliator in the hope of arriving at a settlement; failing a settlement within 60 days, the complaint would be referred to the Tribunal. The Respondent filed an application for judicial review and, in the interim, the conciliation was unsuccessful. The complaint was then referred to the Tribunal for hearing. Consequently, the Respondent asked the Tribunal to stay the proceeding until the final determination of its judicial review application before the Federal Court. Ultimately, the Tribunal dismissed the motion for adjournment and maintained its refusal to apply the test set out in *MacDonald* and *Metropolitan Stores*. The Tribunal embarks on an exhaustive explanation of this decision, which reflects the preferred approach taken in *Léger*:

> [In MacDonald and Metropolitan Stores], the reviewing courts had the statutory authority to stay proceedings. As does the Federal Court, Trial Division. Under s. 18.2 of the *Federal Court Act*, the Federal Court may stay the proceedings of a federal tribunal pending review.

> There is nothing in the *Canadian Human Rights Act* that confers …the statutory power on the … Tribunal to stay its proceedings pending an application for judicial review. (At paras. 11 and 12.)

[30] The Tribunal then proceeds to explain the applicable test:

> The Act requires that proceedings before the Tribunal be conducted informally and expeditiously and also provides that this mandate of the Tribunal is subject to the rules of natural justice (s. 48.9(1)). …
>
> It is well established that administrative tribunals are masters of their own proceedings. As such, they possess significant discretion in deciding requests for adjournments. …
>
> It is clear then that this Tribunal, when exercising its discretion, must do so having regard to principles of natural justice. Some examples of natural justice concerns to which the Tribunal could respond to, would be unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party. (At paras 14, 15 and 17.)

[31] Finally, as was noted by the Commission, a similar line of reasoning as that found in *Léger* and *Baltruweit* was adopted in a number of recent decisions: *Marshall v. Cerescorp*, 2011 CHRT 5, *Marshall v. Cerescorp*, 2011 CHRT 9 and *Emmett v. Canada Revenue Agency*, 2012 CHRT 3.

[32] This second school of thought in the case law raises an important point when it asserts that administrative tribunals are masters of their own procedures. As the Respondent points out, Rule 1(6) of the *Canadian Human Rights Tribunal Rules of Procedure* adopted under the Act, bestows a great deal of discretion on Tribunal members in matters of procedure:

> 1(6) The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules.

[33] Thus, the Tribunal is not required to apply the test set out in *MacDonald* and *Metropolitan Stores*, although it may use it as a guide or as a reference, depending on the circumstances and the parties' submissions. However, the process chosen by the Tribunal must comply with the provisions and the purpose of the Act, which is to eliminate discrimination, and which therefore implies a timely resolution of discrimination complaints. Moreover, subsection 48.9(1) of the Act affirms this desire to take corrective measures against discriminatory practices in a timely manner:

> 48.9 (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[34] Therefore, to obtain an adjournment, the Respondent in this case must convince the Tribunal that the continuation of this proceeding, without additional delays, would result in a denial of natural justice and procedural fairness. This approach seems all the more suitable, given that, if necessary, the Respondent may apply to the Federal Court for a stay of proceedings before the Tribunal. In fact, section 18.2 of the *Federal Courts Act*, RSC, 1985, c F-7 states the following:

> 18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

[35] In the meantime, the Tribunal must give effect to the purpose and provisions of the Act, which require that complaints of discrimination be dealt with expeditiously while adhering to the principles of natural justice.

B. Reasonable apprehension of bias

[36] In support of its motion for adjournment, the Respondent contends that a reasonable apprehension of bias arises from the appointment of the Member. In this regard, the only facts

raised by the Respondent in support of its allegation of a reasonable apprehension of bias are the portions from *Malec* cited by Justice Tremblay-Lamer in *Conseil des Montagnais* at paragraphs 31 and 32. In his reply, at paragraphs 8 and 9, the Respondent states:

> [Translation]
>
> 8. As for the claim by the Commission and the Complainants that the Respondent's arguments are not supported by specific facts, demonstrating that Member Doucet cannot rule on the complaint a second time, we refer the Tribunal to the Respondent's factum, a copy of which is attached hereto, placed in the Federal Court's judicial review docket;
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> 9. In the said factum, the Respondent provides a description of the facts and of the comments made by member Doucet in his decision, dated January 27, 2010, and highlighted by Justice Tremblay-Lamer in her judgment previously filed in the record…

[37] The facts and comments referred to by the Respondent are summarized by Justice Tremblay-Lamer in *Conseil des Montagnais* as follows:

> In this regard, the Tribunal determined that no evidence had been adduced by the applicant to justify why this allowance had not been paid to the Respondents:
>
> > The burden is now on the respondent to show, on a balance of probabilities, that there was a *bona fide* justification to deny the Complainants the isolated post allowance. **The respondent did not submit any evidence** to justify this unfair treatment. Moreover, the respondent did not submit any evidence to show that the treatment was due to the permanent residence of the recipients rather than their race/ethnic origin or national origin. The so-called "admissions" by the Complainants have no probative value that would allow such a conclusion or practice. (Tribunal's decision, at para. 45). [Emphasis added.]
>
> However, it is not true that the employer failed to submit any evidence to justify the isolated post allowance policy**.** (At paras 31 and 32.)

[38] In my opinion, these facts and comments do not provide a sufficient basis, in the circumstances, for a reasonable apprehension of bias.

[39] Allegations of a reasonable apprehension of bias must be taken seriously, as they have major consequences for the reputations of both the justice system and the quasi-judicial system. Such allegations are not to be made lightly. This is why there is a presumption that the trier of facts, in this case the Tribunal member, is impartial. This presumption can only be rebutted by concrete facts and persuasive evidence.

[40] In *Arthur v. Canada (Attorney General)*, 2001 FCA 223, the court was faced with an allegation of a reasonable apprehension of bias. In its decision against the applicant, the court emphasized the seriousness of the allegation in question as well as the extent and nature of the evidence required:

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. (At para. 8).

[41] In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369, the Supreme Court established the applicable test for determining whether there is a reasonable apprehension of bias:

> [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. … [T]hat test is … what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. … (At paras 40 and 41.)

[42] In light of the evidence submitted by the Respondent, a well informed person who has thought the matter through would likely not conclude that there is a reasonable apprehension of bias. The fact that a judge or tribunal member may have erred in law is not indicative of a prejudice or any degree of bias; at most it reveals an error in the assessment of the law and of the facts. Without additional evidence showing that the Member was biased and did not simply err in law, a well informed person could not conclude that there is a reasonable apprehension of bias.

[43] For example, in *Irvine v. Canadian Armed Forces*, 2004 CHRT 9 (*Irvine*), the Tribunal had, in a previous decision (*Irvine v. Canada (Canadian Armed Forces)*, [2001] DCDP No 39), found that the Canadian Armed Forces had acted in a discriminatory manner when the complainant was medically released. In a judicial review (*Irvine v. Canada (Canadian Armed Forces)*, 2003 FCT 660), the Federal Court determined that the Tribunal had erred by failing to apply the *Meiorin* test in accordance with the principle of "universality of service", a principle recognized by the case law and requiring every member of the Armed Forces to be fit to be "a soldier first". The matter was referred back to the Tribunal for redetermination in accordance with the principles of universality of service.

[44] However, in *Irvine*, the case referred back to the Tribunal was assigned to the same member. As with a number of cases, errors by a judge or member of an administrative tribunal do not, in and of themselves, constitute a reasonable apprehension of bias.

[45] Given that the Respondent raises no facts other than those mentioned by Justice Tremblay-Lamer in *Conseil des Montagnais*, the evidence is insufficient to demonstrate a reasonable apprehension of bias. It therefore follows that the continuation of the proceeding before the same Tribunal member is not contrary to the principles of natural justice. Hence, the adjournment requested by the Respondent has no basis in law.

C. Irreparable harm and balance of convenience

[46] Since the Respondent based the arguments in his request on the test set out in *MacDonald* and *Metropolitan Stores*, it should be noted that the motion for adjournment would also have been dismissed had the tripartite test been applied.

[47] Assuming there was a serious question, the Respondent has not, in my opinion, provided evidence of irreparable harm. In this regard, the Respondent claims that legal costs incurred as well as any sums of money the Tribunal may order to be paid constitute irreparable harm. However, it is well established that this kind of expenditure is more a question of inconvenience than irreparable harm (*Laurendeau* at para. 19).

[48] The Respondent further alleges that it would suffer irreparable harm by risking the disclosure of evidence that could be prejudicial to it in any future hearing. This fear appears to be unfounded in the circumstances. The Federal Court referred the matter back to the Tribunal for redetermination and analysis based on existing evidence (*Conseil des Montagnais* at paras 32 to 38). Moreover, the facts outlined by the Respondent in no way suggest that the introduction of new evidence would be called for.

[49] As regards the balance of convenience, in my view, the inconvenience to the Complainants by being denied their right to an expeditious resolution of their complaint, after several years of litigation, outweighs any inconvenience to the Respondent by having to be party to these proceedings.

D. Commission's intervention

[50] As for the Respondent's objection to the Commission's intervention, it is unfounded in law. Rule 1(1) of the *Canadian Human Rights Tribunal Rules of Procedure* clearly sets out the purpose of the rules, including:

> (a) all parties to an inquiry have the full and ample opportunity to be heard;

[51] Rule 1(3) defines "party" as follows:

> "party", in respect of an inquiry, means the Canadian Human Rights Commission, the complainant, and the person against whom the complaint was made;

[52] In my opinion, Rule 1(3) implies that the Commission is a party to any proceedings before the Tribunal and may choose to intervene at any moment, pursuant to Rule 1 and notwithstanding Rule 8 on the adding of parties and interested parties. Furthermore, the Respondent cites no authority to the contrary. The Commission was entitled and remains entitled to intervene in these proceedings.

IV. Conclusion

[53] For the foregoing reasons, the Respondent's motion for adjournment is dismissed.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
April 11, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1318/4808

Style of Cause: Évelyne Malec et al. v. Conseil des Montagnais de Natashquan

Ruling of the Tribunal Dated: April 11, 2012

Appearances:

Daniel Jouis, for the Complainants

François Lumbu / Giacomo Vigna, for the Canadian Human Rights Commission

John White / Marie Eve Pouliot, for the Respondent