No.39031

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NEW BRUNSWICK COURT OF APPEAL)

BETWEEN:

NOEL AYANGMA

APPLICANT

and

UNIVERSITY OF MONCTON, CAMPUS OF MONCTON and ASSOCIATION DES BIBLIOTHECAIRES, PROFESSEURES ET PROFESSEURS DE L'UNIVERSITE DE MONCTON

RESPONDENTS

REPLY TO RESPONSE FILED BY THE RESPONDENT UNIVERSITY OF MONCTON, CAMPUS OF MONCTON

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4. *Del Castillo v. Canada (Minister of Employment and Immigration)* (1994), 79 F.T.R. 207 at para. 24 (F.C.T.D.), [1994] F.C.J. No. 538 (F.C.T.D.) (QL)).
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1. This is a reply from the response filed on behalf of the Respondent, University of Moncton in the above referenced matter. The Applicant completely disagrees with the Respondent's bold assertions made at paras.4, 18-23 of its response that the application lacks any question of public or national importance warranting the intervention of this Honourable Court.

A. Issues of Public or National Importance

2. The Applicant submits contrary to the Respondent's suggestion, that not only the issues raised in his application, including the issue around impartiality and neutrality of the judges who presided over the disputes which are the subject matter of the proposed appeal, and thus the issue of bias and/or reasonable apprehension of bias arising from the Applications judges' conduct, but also and more importantly, the unjustified and abusive/restrictive access to justice imposed upon the Applicant, which issues as it would be demonstrated below, clearly suggest a travesty akin to miscarriage injustice, which issues are of course of public importance.

3. In short, it is crystal clear from a careful listening to the audio recordings provided to this Court, which audio recordings were before the Court of Appeal and failed to listen to despite having indicated during the hearing, with the consent of the Respondent, that it would listen to, given the seriousness of allegation leveled against the Applications judge, which recordings would have depicted not only the gratuitous and uncalled for sarcastic comments made by the Applications judge, but also the Applications judge's tone of voice, his impatience and as well as his aggressiveness at the hearing as reproduced at paras.48-56 of the Application for Leave, which conduct, the Applicant submits was clearly both unjustified and unwarranted.

4. The Applicant submits, it would be apparent when listening to the audio recordings provided and/or from reading the relevant excerpts of these audio recordings reproduced within the body of the Application for Leave, that the Applications judge has crossed the line and that his conduct was the result of an opinion based on a prejudgment of the matters before him, including for those matters that were clearly not on the docket before him at the time, they comments were made, which matters he later presided over after refusing to recuse himself. The Applicant submits that had the Court of Appeal listened to the audio as it had indicated it would, it would have concluded that the conduct of the Applications judge was unacceptable and that he proceeded with a corrupt mind.

5. The Applicant submits that not only Courts have recognized the importance and usefulness of audio recordings in the in search of truth, listening to the audio recordings in this case, was a must and necessary, in the determination of both the allegation of bias/reasonable leveled against the Applications judge, so as to ascertain whether through his conduct, including the tone of his voice and his demeanor, the Applications judge crossed the line and prejudged the issues before him in favour of the Respondent. This Court will certainly agree that determination of a charge of bias or reasonable could not have been made simply by reviewing the reasons or any transcript as the Court of Appeal had purported to have in the case under consideration

6. The Applicant submits that the Court of Appeal's failure to review the audio recording, and therefore its decision to ignore the evidence adduced (audio recordings), would of course amount not only to substantial error of law, but it would also be fatal to the Court of Appeal judgment. The Applicant submits that this type of error alone would certainly warrant the intervention of this Honourable Court. The Applicant further submits that the scale of the judges' tasks must not cause them to lose sight of the fact that the rules of natural justice must always be observed and that their conduct during hearings and applications for protection, must, at all times, be irreproachable and objective. It goes without saying, that the most basic courtesy and politeness are *de rigueur*.

7. The Applicant submits, there is no place for intimidation, contempt, and offensive innuendo, nor for harshness or inappropriate language from a presiding judge or presiding judges. This exactly what the Right Honourable Mr. Justice Fauteux wrote in the *Livre du magistrat* ["a book for judges"], "[TRANSLATION]

> **The judge will ensure the climate necessary for the operation of justice by his moderation, his discipline and his courtesy in his relations with counsel, the parties and the witnesses." (The Right Honourable Gérald Fauteux, *Le livre du magistrat*, Minister of Supply and Services Canada, 1980, at page 49).**

8. The Applicant submits that procedural fairness requires presiding judges to conduct hearings in an objective, moderate, irreproachable manner, with politeness and basic courtesy, and it cannot be said that this is not what occurred here based on the facts disclosed by the audio recordings, as demonstrated by the excerpts of the audio recordings, which is submitted speak volume and confirm the allegation of bias/reasonable apprehension of bias made against the Applications judge, but they also demonstrate why the Applications judge ought to have recused himself from presiding over a matter or matters he had already pre-judged and and/or opined on, despite not before him at the time.

9. The Applicant submits, contrary to the Respondent' submission, the conduct complained about clearly warrants the intervention of this Court. It is not a surprise that the Respondent had not even attempted to address this reality in its response to the application as there is no dispute even from the Respondent that the Applications judge raised his voice in an intemperate manner or about anything the Applicant had alleged occurred in this case. It would appear from listening to the audio recordings that the Applications judge was very frustrated supposedly by his ego was in line with the serious allegation of bias levelled against him and the request that he recuses himself from hearing any of the matters assigned to him.

10. The Applicant submits that if this Court carefully reviews of the exchanges during the hearings between him and the Applications judge, which exchanges the Court of Appeal had confirmed it will review by listening to the audio recordings in order to determine both the demeanor and the tone of the voice of the presiding Applications judge, and failed to do so, this Court will not only certainly, as a reasonable person would, conclude that Applications judge had crossed the line as an impartial adjudicator, but also prevented the applicant from having a fair hearing where he could fully present his case. ***See (Guermache v. Canada (Minister of Citizenship and Immigration)1,*** 2004 FC 870 (CanLII) at para.13, ***Quiroz Mendez v. Canada (Citizenship and Immigration)2*** 2011 FC 1150, (CanLII), (***Farkas v. Canada (Minister of Citizenship and Immigration)3***, [2001] F.C.J. No. 356 at para. 8 (F.C.T.D.) (QL), 2001 FCT 190 (F.C.T.D.); ***Del Castillo v. Canada (Minister of Employment and Immigration)*** 4(1994), 79 F.T.R. 207 at para. 24 (F.C.T.D.), [1994] F.C.J. No. 538 (F.C.T.D.) (Ql).

Conclusion:

11. The Applicant submits that upon reading and listening the relevant excerpts of the audio recordings, provided to the Court, this Court can only conclude that the presiding Applications judge lost control of his demeanor by raising his voice and shouting in an angry and sarcastic and demeaning tone of voice in attempt to intimidate the Applicant. The Applicant submits this is clear indication that he lost his temper with the Applicant. Consequently, a reasonable observer in the hearing room would likely think that the presiding judge was angry, and in a state of mind against the Applicants, a lay litigant.

12. The Applicant further submits that if a judge is angry and shouts at a lawyer, or at lay litigant appearing before him or her, as it appears to be what occurred in the present case, a reasonable person would have a reasonable apprehension that the judge was biased against that litigant or lawyer's case.

13. The Applicant submits that not only his ability to have a fair and impartial hearing before Courts below was not only compromised by the Applications judge's refusal to recuse himself, based on the comments he made on a matter that was not before him and was latter assigned to him, but more importantly, by the Court of Appeal's failure to listen to the audio recordings to ascertain both the Applications judge's tone of voice and demeanor, despite confirming during the hearing of the appeal that it will do so.

14. The Applicant submits that all of this clearly suggests that there had been an injustice in the present case. As such a reasonable person informed of all these circumstances would conclude that the Board would more likely than not, not decide the matter fairly. Contrary to the Respondent's suggestion, all of the above warrants the intervention of this Court, so as to avoid further miscarriage of justice and restore trust in the administration of justice in the province of New Brunswick.

B. Jurisdiction of the Arbitrator to entertain a grievance based on an administrative suspension with pay pending the outcome of the investigation and before the investigation is completed

15. As to this issue, the Applicant submits that not only jurisdictional issues are issues of public importance, and in particular as here, where it is alleged that the arbitrator has acted without jurisdiction and made with he dealt not with a grievance that was purely of an administrative nature without first establishing his jurisdiction after it was objected to, but also when he dealt with a sanction that was imposed pending the outcome of the investigation, and before it was completed, and made an order as a result that he had no authority to make. The Applicannt submits that such a conduct will certainly raise an issue of both public and national importance, warranting the intervention of this Court .

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1 *See (Guermache v. Canada (Minister of Citizenship and Immigration),* 2004 FC 870 (CanLII) at para.13
2 *Quiroz Mendez v. Canada (Citizenship and Immigration)* 2011 FC 1150, (CanLII),
3 (*Farkas v. Canada (Minister of Citizenship and Immigration),* [2001] F.C.J. No. 356 at para. 8 (F.C.T.D.) (QL), 2001 FCT 190 (F.C.T.D.);
4 *Del Castillo v. Canada (Minister of Employment and Immigration)* (1994), 79 F.T.R. 207 at para. 24 (F.C.T.D.), [1994] F.C.J. No. 538 (F.C.T.D.) (QL)).

16. The Applicant submits that the issue is not who drafted the grievance and what the drafter of the grievance thought at the time he drafted it, as suggested by the Respondent, but rather the issue is about what was advanced and objected at the outset of the hearing and/or during the hearing of the grievance as to the arbitrator's jurisdiction to deal prematurely with a grievance that was clearly of administrative nature as detailed in the body of the letter of suspension including in the Application material which unambiguously demonstrates that the suspension was **a suspension with pay pending the outcome of an investigation.**

17. Simply put, if an arbitrator does not have the required jurisdiction to deal with a grievance that is of administrative nature, and even if he did, which is specifically denied as it was never determined by the arbitrator, he would have no such jurisdiction to deal, in this case, he would not certainly have jurisdiction to deal with a grievance based on a sanction imposed with pay pending the outcome of the investigation, and/or conduct such a hearing as it was the case here, and/r conduct such hearing before the completion of that investigation, as it is clear from the facts of this case that the hearing of the grievance took place in May of 2018 while the completion of the investigation was in July on the same year, showing that the hearing of the grievance itself was clearly premature

Conclusion:

18. The Applicant submits that, the answer to this important jurisdictional question would not only benefit the Applicant, but it would also benefit other litigants faced with similar problems, and as well as, the arbitration processes where arbitration tribunals are faced with similar jurisdictional issue, which jurisdictional issue, is submitted it is on itself an issue of both public and national importance.

19. The Applicant submits that not only the Arbitrator erred in law and acted without jurisdiction in dealing with an issue that was on its face of an administrative nature, but also a grievance that was premature and thus not properly before him. It therefore follows that the Courts below all also erred in law in concluding that the arbitrator had jurisdiction to deal with the issue raised because the grievance was simply before, despite his prematurity. Had the Arbitrator determined his jurisdiction after it was objected to he would have concluded based on the jurisprudence on point that he had no jurisdiction to deal with the grievance at the the time.

C. Standing Before the Court on Judicial Review

20. The Applicant submits that the issue of standing though also an important, issue, which is capable of triggering the intervention of this Court, this issue, would only be relevant, depending on the resolution of the jurisdictional issue. Notwithstanding this, the issue of standing raised here, which is also an issue of public interest, as it involves the continuous representation of grievors by union counsels, and in particular as her where it was specifically alleged that union counsel, had crossed the line by asking that the grievor whom he was retained to defend, in contempt of the tribunal simply because the grievor disagrees with his counsel's approach to the resolution of his grievance.

E. Restriction of Access to Justice

21. In ***Hryniak v. Mauldin***, 2014 SCC 7 (CanLII), [2014] 1 SCR 87, KARAKATSANIS J., writing for this Court, recognized at para. 1 the importance of ensuring access to justice which is what the Applicant is complaining about in the present, when she stated that:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted

22. The Applicant submits that this ordeal is nothing but a travesty full of abuse and misuse of the power entrusted on a judge of the Court, given the fact that the decision to bar the Applicant's access to justice was simply to protect the Respondent, without any evidence that it was willfully attacked, harassed or annoyed by the Applicant, in any shape or form. There is no evidence before this Court, including in the decision under attack which could form the basis of the drastic restriction imposed on the Applicant restricting his access to the Courts in New Brunswick Applicant who was simply on the evidence before the Court, seeking an impartial forum to right the wrongs perpetrated against him by the Respondent.

23. It is clear from the evidence before this Court, including the evidence arising from two decisions under consideration by this Court (SCC 300928 and 30931), and as well as the panoply of decisions rendered in the PEI Courts from which such a drastic measure could have legally been justified against the Applicant, given that the PEI Courts have failed to do so in several occasions.

24. A decision to bar someone from the Court or restrict his access to the Courts cannot be made in a vacuum or be based either on a previous decision which had been vacated by a higher court and thus no longer legally sound or simply because an individual is pursuing his constitutional rights to right the wrongs perpetrated against him over 3 decades.

25. As previously stated, this case is nothing, but a travesty and an injustice perpetrated against the Applicant at all level of the judicial system, which travesty on itself would raise an issue of public interest involving a blatant and abusive restriction of a citizen access to the Court. This is clearly not what the law was intended to serve as the alleged conduct clearly defeats the purpose of the law.

26. **The Applicant submits that to restrict a citizen's access to justice would require more than two decisions from the same judge who was asked to recuse himself and refused to do so, and let alone from a judgment which had been vacated by a higher court. in another jurisdiction, where the Courts had been unable to declare the Applicant "vexatious litigant" over more than two decades of litigations involving more than 150 decisions.**

27. The Applicant submits that not only the decision under attack fails to meet the threshold for declaring someone "vexatious litigant" but it is also inconsistent with both *Ayangma v. Attorney General* supra, and the decision of the Alberta Court of Appeal which set out at para.38 relying on *644036 Alberta Ltd v Morbank Financial Inc*2014 ABQB 681 at paras 51-97, 26 Alta LR (6th) 153, litigation", the difference between a vexatious litigation and a vexatious litigant.

28. The Applicant submits that while conducting a vexatious proceeding, the remedy is sanctioned by costs, declaring someone vexatious litigant, which is more drastic and involves more, including harassment and annoyance of the other party, which there is no evidence for before this Court and was none were before the Courts below, is sanctioned by a restriction to access to the Courts, which remedy is more such drastic and the litigant is by the same token declared "vexatious litigant" which is clear not the case here.

Overall Conclusion

29. While the Applicant does not submit that there was actual bias, but he rather, nonetheless submits that the tone of the voice and the demeanor of the Motions judge, including his refusal to recuse himself and as well as the sarcastic comments he made about the Applicant's qualifications provide a reasonable basis for the appearance of bias. The tone and temper of the Motions judge and as well as the manner he conducted the hearings and the comments would suggest unfairness to an impartial observer, and so would the Court of Appeal's failure to review the audio recording the ascertain same and arriving at the conclusion that the was not bias or reasonable apprehension of bias arising from the Motions judge's overall conduct.

30. Referencing the Supreme Court of Canada judgment in ***R. v. S.(D.)***[5], 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, the Applicant submits that the words and actions of a the Arbitrator, that of the Applications judge and as well as the conduct of the appeal create an appearance of unfairness. For the justice system to have "the respect and confidence of its society ... fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer." The Applicant submits that the overall conducted of the Courts below is nothing but a travesty akin to a miscarriage of justice.

31. The Applicant further submits that justice must not only be done, but also be seen to be done. "This standard of fairness requires that a court hold its hearings in a serene manner, without bias or appearance of bias, allowing each party the opportunity to fully and adequately present his or her case," relying on ***R. v. Roy***[6], (2002), 2002 CanLII 41133 (QC CA), 167 C.C.C. (3d) 203 (Que. C.A.) at p. 208, this is not what occurred here. While no trials/hearings or appeals are perfect, judges' conduct should not devolve, as here, into condescension, mockery or ridicule of a party, and in this case the Applicant, a lay litigant, such that a reasonably informed observer would conclude the trial or hearing was conducted unfairly, it results in reversible error.

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5 *R. v. S.(D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484,

6 *R. v. Roy*, (2002), 2002 CanLII 41133 (QC CA), 167 C.C.C. (3d) 203 (Que. C.A.)

32. The Applicant submits that Court of Appeal's failure by the Court of Appeal to listen to the audio recording despite having indicated and confirmed that it will to do so, and therefore ignoring this crucial evidence, and reaching a conclusion that there was no evidence of reasonable apprehension of bias, arising from the Motions judge's tone of voice and his demeanor as alleged, is not only flawed and problematic as it illustrates a general prejudice towards the Applicant, but it is also unjudicial and fatal to the Court of Appeal's judgment.

33. The Plaintiff resubmits that this a travesty and a miscarriage of justice that warrants the intervention of this Court so as to restore trust, in the administration of justice in the province of New Brunswick.

ALL OF THIS IS RESPECTFULLY SUBMITTED this 25th day of February 2020.

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AUTHORITIES

1. ***Guermache v. Canada (Minister of Citizenship and Immigration),*** 2004 FC 870 (CanLII) at para.13
2. ***Quiroz Mendez v. Canada (Citizenship and Immigration)*** 2011 FC 1150, (CanLII);
3. ***Farkas v. Canada (Minister of Citizenship and Immigration)***, [2001] F.C.J. No. 356 at para. 8 (F.C.T.D.) (QL), 2001 FCT 190 (F.C.T.D.);
4. ***Del Castillo v. Canada (Minister of Employment and Immigration)*** (1994), 79 F.T.R. 207 at para. 24 (F.C.T.D.), [1994] F.C.J. No. 538 (F.C.T.D.) (QL)).
5. ***Ayangma v. The Attorney General (P.E.I.),*** 2004 PESCAD 11 (CanLII)
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