

Federal Court



Cour fédérale

Date: 20220831

Docket: T-1919-21

Citation: 2022 FC 1245

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 31, 2022

PRESENT: Mr. Justice Pamel

BETWEEN:

MICHELINE DAHLANDER

Applicant

and

CBC / SOCIÉTÉ RADIO-CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The employment of the applicant, Micheline Dahlander, was terminated after the respondent, CBC/Société Radio-Canada [CBC], abolished her position following a restructuring of her department.

[2] On January 30, 2019, Ms. Dahlander filed a complaint for unjust dismissal under section 240 of the *Canada Labour Code*, RSC 1985, c L-2, Part III, with the Labour Program Office at Employment and Social Development Canada, for which an adjudicator, Gilles Brunet [Adjudicator], was appointed. During the adjudication process, the CBC made Ms. Dahlander an offer to settle. Ms. Dahlander initially strongly opposed this offer, but after a discussion with her counsel, Benoit Marion, she promised to reflect on the offer of settlement, without formally accepting it. According to Mr. Marion, Ms. Dahlander instructed him to accept the CBC's offer. Mr. Marion therefore informed the CBC's senior labour and employment lawyer, Marie Pedneault, of his client's decision. Counsel for the parties informed the Adjudicator that a settlement agreement had been reached and that a draft transaction and release would be prepared by Ms. Pedneault and sent to Mr. Marion for review, approval and signature. A few days later, Ms. Dahlander informed Mr. Marion that she was refusing the CBC's offer and that she wished to continue with the adjudication process.

[3] Following Ms. Dahlander's refusal, the CBC raised a preliminary objection to the Adjudicator's jurisdiction to hear the unjust dismissal complaint because it had been the subject of a transaction between the parties. Ms. Dahlander was not represented by counsel at the hearing of the preliminary objection. On November 17, 2021, the Adjudicator allowed the CBC's preliminary objection and rejected Ms. Dahlander's unjust dismissal complaint. The Adjudicator is of the opinion that the settlement agreement reached between the parties during the adjudication process is a contract of transaction within the meaning of article 2631 of the *Civil Code of Québec*, CQLR, c CCQ-1991 [CCQ]. That decision is the subject of this application for judicial review.

[4] For the reasons that follow, I am of the opinion that the application for judicial review should be dismissed.

II. Background

[5] Ms. Dahlander was hired by the CBC in 1997 as an interviewer, radio reporter and cultural news reader. After holding various positions, she was promoted to head of community relations and diversity in the CBC's news sector in 2013.

[6] In a letter dated November 7, 2018, the director general of the CBC news department informed Ms. Dahlander that her position had been abolished because of a restructuring in the news sector and that her employment was ending that same day. On December 21, 2018, Ms. Dahlander sent the CBC a demand in which she stated that the abolition of her position was only a pretext for getting rid of her and requested that she be reinstated in her workplace. In a letter dated January 11, 2019, the CBC informed Ms. Dahlander that it was refusing her request to be reinstated and that it maintained that the termination of her employment was due to a restructuring within the news sector.

[7] On January 30, 2019, Ms. Dahlander filed a complaint for unjust dismissal under section 240 of the *Canada Labour Code* with the Labour Program Office at Employment and Social Development Canada. On September 23, 2020, Mr. Brunet was appointed as the adjudicator to hear the complaint.

[8] The CBC presented its evidence on the first day of the hearing, which took place on May 19, 2021. The second day of hearing scheduled for June 3, 2021, was cancelled at the request of Mr. Marion, who stated that he was unable to start presenting the evidence before the third day of hearing scheduled for July 8, 2021. Ms. Dahlander states that she did not request a postponement of the hearing. Before the hearing began on July 8, 2021, Mr. Marion requested an adjournment to speak with Ms. Dahlander, who seemed agitated. According to Ms. Dahlander, she was shaken to note the absence of an important witness she wanted to testify. Before the hearing began, Mr. Marion informed Ms. Dahlander that the CBC wished to make her an offer to settle. Ms. Dahlander states that she informed her lawyer several times that she did not want to accept the offer, but that Mr. Marion had insisted that she accept an improved offer and that she had felt trapped. Because of Mr. Marion's insistence, she had agreed to take time to think about it, without, however, accepting the offer. According to Mr. Marion, Ms. Dahlander accepted the improved settlement offer after he had persuaded her that the CBC's offer was reasonable in the circumstances of her case. He therefore advised Ms. Pedneault of his client's decision. Counsel for the parties informed the Adjudicator that they had reached a settlement agreement and that a draft transaction and release would be prepared by Ms. Pedneault and sent to Mr. Marion for review, approval and signature.

[9] The next day, July 9, 2021, Mr. Marion, at Ms. Dahlander's request, wrote to Ms. Pedneault requesting a complete copy of the insurance policy applicable to her client's situation. On the same day, Ms. Pedneault replied that Ms. Dahlander was not covered by any insurance policy and, following the discussions of the day before, sent Mr. Marion the draft transaction and release.

[10] On July 11, 2021, Ms. Dahlander informed Mr. Marion by email that she was refusing the CBC's offer, writing as follows: [TRANSLATION] "I've thought about it. I refuse the CBC's offer. I will continue with adjudication on July 21." On July 12, 2021, Mr. Marion informed Ms. Pedneault by email that Ms. Dahlander no longer wished to consent to the agreement in principle reached on July 8, 2021, but that he [TRANSLATION] "did not know any more" and that his client planned to begin presenting the evidence related to the unjust dismissal complaint as early as July 21. Ms. Pedneault replied to Mr. Marion that she did not understand this reversal and that the CBC planned to raise a preliminary objection on the ground that the parties had entered into a transaction on July 8, 2021, pursuant to article 2631 of the CCQ. Mr. Marion immediately replied to Ms. Pedneault that he would discuss it with Ms. Dahlander.

[11] On July 15, 2021, a meeting took place between Ms. Dahlander, Mr. Marion and the lawyer who had initially referred Ms. Dahlander to Mr. Marion. During this meeting, Ms. Dahlander expressed her dissatisfaction with the conduct of the adjudication and with Mr. Marion's services. Ms. Dahlander states that she heard Mr. Marion say the word "transaction" for the first time during this meeting. Mr. Marion explained to Ms. Dahlander the risks she would face if she refused the offer since he could no longer represent her and he would have to testify against her. According to Mr. Marion, during this meeting, Ms. Dahlander agreed to reflect again on the settlement offer, and he had hoped for a quick response from her because of a conference call with Ms. Pedneault and the Adjudicator scheduled for the following day.

[12] The conference call scheduled for July 16, 2021, was postponed to July 19, 2021, to allow Ms. Dahlander and Stéphanie Peiller, the Director of Human Resources, CBC French

Services, to attend. However, the conference call was postponed again because Mr. Marion had not been able to reach Ms. Dahlander since July 16. Later that day, Mr. Marion advised the Adjudicator and Ms. Pedneault that he was of the opinion that his mandate had ended given Ms. Dahlander's failure to cooperate with him or the loss of trust between Ms. Dahlander and him.

[13] Ms. Pedneault then contacted the Adjudicator to set a hearing date to determine the preliminary issue, which solely concerned whether the parties had made a transaction on July 8, 2021. On July 21, 2021, the Adjudicator contacted Ms. Dahlander to advise her that Mr. Marion had informed him that he had stopped representing her and to advise her that the CBC intended to invoke the existence of a transaction as a preliminary objection to her complaint of unjust dismissal. On July 22, 2021, Ms. Dahlander replied to the Adjudicator that she did not [TRANSLATION] "really understand what [was] going on", that she was [TRANSLATION] "afraid" and that she [TRANSLATION] "felt trapped". On August 17, 2021, Ms. Dahlander informed the Adjudicator that she would represent herself at the hearing concerning the preliminary objection.

III. Adjudicator's decision

[14] On October 19, 2021, the Adjudicator held a hearing to determine the preliminary issue concerning the existence of a transaction between the parties. The CBC was represented by another lawyer, and Ms. Dahlander represented herself. The Adjudicator heard the testimonies of Ms. Dahlander, Mr. Marion, Ms. Pedneault and Ms. Peiller, who had also been present on July 8, 2021. In the November 17, 2021, decision, the Adjudicator allowed the CBC's preliminary objection and rejected Ms. Dahlander's unjust dismissal complaint. After reviewing the

testimony, the Adjudicator concluded that the parties had made a transaction on July 8, 2021, as follows:

[TRANSLATION]

In consideration of the discontinuance of the complaint and a full and final release of the Complainant, the Employer shall pay the Complainant a severance payment equal to 52 weeks' salary, together with the services of a relocation firm for a period of 6 months.

[15] The Adjudicator concluded that the agreement reached by the parties on July 8, 2021, contained the three elements required for a transaction within the meaning of article 2631 of the CCQ, that is, the parties' desire to end the dispute, mutual concessions, and the existence of an agreement on the essential elements that put an end to the dispute (citing *Beaulieu c Compagnie Mutuelle d'assurance en Église*, 2021 QCTAT 2776 (WL) at paras 11–14).

[16] The Adjudicator rejected Ms. Dahlander's argument that she had never accepted the settlement offer, that she had only taken the offer to review and consider it, and that she had decided, after reflection, to refuse it. The Adjudicator concluded that he could not disregard the credible testimony of Ms. Pedneault and Mr. Marion that there had been consent between the parties on July 8, 2021. The Adjudicator noted that it would be [TRANSLATION] "surprising and inconceivable, to say the least, for Mr. Marion to go beyond the mandate given to him by his client and inform the Tribunal that a settlement had been reached when he had not obtained her authorization in this regard". The Adjudicator also noted that Ms. Dahlander had never repudiated her lawyer for exceeding his mandate and that a monetary counter-offer was made to the offer, which led to an improvement in the initial offer, showing that she wanted to reach a settlement. The Adjudicator concluded that it was more likely that Ms. Dahlander had

subsequently changed her mind, and the fact that she was experiencing a period of intense stress was not sufficient to demonstrate that her consent was not informed when she accepted the offer.

[17] In addition, the Adjudicator rejected Ms. Dahlander's argument that she had not signed any documents on July 8, 2021. According to the Adjudicator, it is not necessary to obtain a written document to invoke a transaction between the parties (citing *Gunner v Cree Nation Government*, 2016 QCTA 756 (WL), citing *Tulli v Symcor Inc*, 2005 FC 1440 at para 40 [*Tulli*]).

IV. Statutory framework

[18] Article 2631 of the CCQ sets out the elements of a transaction:

2631. Transaction is a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations.

A transaction is indivisible as to its subject.

2631. La transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques.

Elle est indivisible quant à son objet.

[19] Under the current version of subsection 240(1) of the *Canada Labour Code*, a person who has been dismissed and considers the dismissal to be unjust may make a complaint with the Head of Compliance and Enforcement [Head]:

Complaint

240(1) Subject to subsections (2) and 242(3.1), a person who has been dismissed and considers the dismissal to be unjust may make a complaint in writing to the Head if the employee

(a) has completed 12 consecutive months of continuous employment by an employer; and

(b) is not a member of a group of employees subject to a collective agreement.

Plainte

240(1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès du chef si :

a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

[20] Under the current version of the *Canada Labour Code*, subsections 241(3) and 242(3) give the Canada Industrial Relations Board [Board] the authority to hear an unjust dismissal complaint referred to it by the head:

Complaint not settled within reasonable time

241(3) If a complaint is not settled under subsection (2) within the period that the Head considers to be reasonable in the circumstances, the Head must, on the written request of the person who made the complaint that the complaint be referred to the Board, deliver to the Board the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided under subsection (1) and any other statements or

Cas d'échec

241(3) Si la conciliation n'aboutit pas dans un délai qu'il estime raisonnable en l'occurrence, le chef, sur demande écrite du plaignant à l'effet de saisir le Conseil du cas, transmet au Conseil la plainte, l'éventuelle déclaration de l'employeur sur les motifs du congédiement et tous autres déclarations ou documents relatifs à la plainte.

documents that the Head has that relate to the complaint.

...

[...]

Decision of the Board

242(3) Subject to subsection (3.1), the Board, after a complaint has been referred to it, shall

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Décision du Conseil

242(3) Sous réserve du paragraphe (3.1), le Conseil, une fois saisi d'une plainte :

a) décide si le congédiement était injuste;

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

[21] Subparagraph 241.2(1)(a)(iii) gives the Board the authority to reject a complaint if it is satisfied that the complaint has been settled in writing between the parties:

Rejection of complaint

241.2(1) The Board may reject a complaint referred to it under subsection 241(3), in whole or in part,

(a) if the Board is satisfied that

(i) the complaint is not within its jurisdiction,

(ii) the complaint is frivolous, vexatious or not made in good faith,

Rejet de la plainte

241.2(1) Le Conseil peut rejeter, en tout ou en partie, une plainte renvoyée en vertu du paragraphe 241(3) :

a) s'il est convaincu que, selon le cas :

(i) la plainte ne relève pas de sa compétence,

(ii) la plainte est futile, vexatoire ou entachée de mauvaise foi,

(iii) the complaint has been settled in writing between the employer and the complainant,

(iii) la plainte a fait l'objet d'un règlement écrit entre l'employeur et le plaignant,

(iv) there are other means available to the complainant to resolve the subject matter of the complaint that the Board considers should be pursued, or

(iv) le plaignant dispose d'autres moyens de régler l'objet de la plainte et devrait faire appel à ces moyens,

(v) the subject matter of the complaint has been adequately dealt with through recourse obtained before a court, tribunal, arbitrator or adjudicator; or

(v) l'objet de la plainte a été instruit comme il se doit dans le cadre d'un recours devant un tribunal judiciaire ou administratif ou un arbitre;

(b) if consideration of the complaint was suspended under subsection 241.1(1) and if, in the Board's opinion, the measures specified in the notice under subsection 241.1(2) were not taken within the specified period.

b) si l'examen de la plainte a été suspendu en vertu du paragraphe 241.1(1) et que le Conseil est d'avis que les mesures précisées dans l'avis visé au paragraphe 241.1(2) n'ont pas été prises dans le délai qui y est précisé.

Notice of rejection of complaint

Avis du rejet de la plainte

(2) If the Board rejects a complaint, it shall notify the complainant in writing, with reasons.

(2) S'il rejette la plainte, le Conseil en avise par écrit le plaignant, motifs à l'appui.

[Emphasis added.]

[Je souligne.]

[22] Section 241.2 was added to the *Canada Labour Code* by section 490 of the *Budget Implementation Act, 2018, No. 2, SC 2018, c 27, s 490*, and came into force on July 29, 2019, at the same time as the coming into force of the amendments made to subsections 241(3) and 242(3) of the *Canada Labour Code* by sections 353 and 354 of the *Budget Implementation Act*,

2017, No. 1, SC 2017, c 20. Thus, since July 29, 2019, the Board has been the quasi-judicial tribunal responsible for interpreting and applying Part III of the *Canada Labour Code*.

[23] Section 240, as it read immediately before July 29, 2019, provided that a person could make a written complaint for unjust dismissal with an inspector:

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

- (a) who has completed twelve consecutive months of continuous employment by an employer, and
 - (b) who is not a member of a group of employees subject to a collective agreement,
- may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Plainte

240(1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :

- a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
- b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

[24] Also, under the previous version of subsection 241(3), the inspector had to endeavour to assist the parties to settle the complaint and, where the complaint was not settled within such period as the inspector endeavouring to assist the parties considered to be reasonable, refer the matter to an adjudicator.

[25] Section 383 of the *Budget Implementation Act, 2017, No. 1*, provides that the *Canada Labour Code*, as it read immediately before July 29, 2019, the date on which section 383 comes into force, applies with respect to any complaint of unjust dismissal made before that date:

Complaints — subsection 240(1)

383 The *Canada Labour Code*, as it read immediately before the day on which this section comes into force, applies with respect to any complaint made before that day under subsection 240(1) of that Act.

Plaintes — paragraphe 240(1)

383 Le *Code canadien du travail*, dans sa version antérieure à la date d'entrée en vigueur du présent article, s'applique à l'égard des plaintes déposées avant cette date au titre du paragraphe 240(1) de cette loi.

V. Issues

[26] Ms. Dahlander has raised four issues on judicial review:

- a) Did the Adjudicator fail to ensure Ms. Dahlander's right to professional secrecy?
- b) Did the Adjudicator breach the principles of natural justice and procedural fairness by failing to fulfill his duty to assist Ms. Dahlander during the hearing on October 19, 2021?
- c) Is the Adjudicator's decision unreasonable because Ms. Dahlander's complaint was not settled in writing between the parties, as required by subparagraph 241.2(1)(a)(iii) of the *Canada Labour Code*?
- d) Is the Adjudicator's decision unreasonable because he did not sufficiently justify in his reasons why he preferred the testimony of Mr. Marion to Ms. Dahlander's?

VI. Standard of review

[27] The parties agree that the appropriate standard of review for the issue of professional secrecy or solicitor-client privilege is correctness, as this question is part of the “general questions of law that are of ‘fundamental importance and broad applicability’, with significant legal consequences for the justice system as a whole or for other institutions of government” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 59–60 [*Vavilov*], citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 70; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 20). Therefore, the presumption of reasonableness is rebutted (*Vavilov* at para 17). According to the Supreme Court of Canada, general questions of law of fundamental importance and broad applicability “require a single determinate answer” (*Vavilov* at para 62).

[28] The parties agree that the appropriate standard for the judicial review of the merits of the Adjudicator’s decision is reasonableness (*Vavilov* at paras 16–17; *Kouridakis v Canadian Imperial Bank of Commerce*, 2021 FC 1035 at para 48). The Court must therefore examine the Adjudicator’s reasons and determine whether the decision is “based on an internally coherent and rational chain of analysis” and “is justified in relation to the facts and law that constrain the decision maker” and whether it exhibits “the requisite degree of justification, intelligibility and transparency” (*Vavilov* at paras 85, 100).

[29] With respect to the issue of the Adjudicator’s duty to assist, the parties disagree on the applicable standard of review. Ms. Dahlander argues that the appropriate standard of review is correctness because a judge’s or adjudicator’s duty to assist an unrepresented person arises from

the rules of natural justice and procedural fairness (citing *Ménard c Gardner*, 2012 QCCA 1546 (WL) at para 55 [*Ménard*]). Although it notes that an issue of procedural fairness is generally not subject to a particular standard of review (citing *Syndicat national des convoyeur(e)s de fonds (SNCF – SCFP), section locale 3812 c Hamelin*, 2021 QCCS 932 (WL) at paras 14–18), the CBC submits that the appropriate standard of review for the issue of the duty to assist is reasonableness since it does not fall within any of the categories that can rebut the presumption that reasonableness is the applicable standard (*Vavilov* at para 17). In my view, the issue of the duty to assist is one of procedural fairness. When faced with a question of procedural fairness, the Court must ask itself “whether the procedure was fair having regard to all of the circumstances”, and the fundamental question is “whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56 [*Canadian Pacific Railway Company*]; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

VII. Analysis

A. *Did the Adjudicator fail to ensure Ms. Dahlander’s right to professional secrecy?*

[30] Solicitor-client privilege is fundamentally important to our judicial system and is intended to preserve the fundamental relationship of trust between lawyers and clients (*Smith v Jones*, [1999] 1 SCR 455 at para 45; *Foster Wheeler Power Co v Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc*, 2004 SCC 18 at para 34; *Canada (Attorney General) v Quadrini*, 2011 FCA 115 at para 29).

[31] However, not all communications between lawyers and clients are privileged. In *Maranda v Richer*, 2003 SCC 67, the Supreme Court of Canada recalled the three prerequisites for this privilege to attach:

42. Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. It is the context in which the communication takes place that justifies characterizing it as privileged. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Justice Dickson (as he then was) in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821, at p. 837, still apply:

. . . (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[32] Ms. Dahlander argues that the Adjudicator breached his duty to ensure respect for professional secrecy under section 9 of the *Charter of Human Rights and Freedoms*, CQLR c C-12, and article 2858 of the CCQ, which provides that “[t]he court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated”.

[33] Ms. Dahlander argues that the Adjudicator was required to explain the content of the right to professional secrecy before her and Mr. Marion’s testimony. She adds that the Adjudicator was required to limit the debate to what was necessary to answer the question of whether the parties had agreed to a settlement. Therefore, the Adjudicator should not have

allowed Mr. Marion to produce Ms. Dahlander's July 11, 2021, email, or reproduced it in his decision (at paragraph 28) without redacting the elements protected by professional secrecy. She argues that the Adjudicator should have, at a minimum, redacted in his reasons the elements that were not relevant to the preliminary objection raised by the CBC, including the following passages from the email:

[TRANSLATION]

Ms. Girard was hired to help victims of harassment, especially when they are subject to threats, violence and retaliation like me. It is unacceptable for her not to show up. Especially since she refused to help me because my harasser was assisting her in writing the RC employee code of conduct. She refers to this link in her report to the Board. I insist that she be there on July 21, even if it means sending a bailiff.

The fact that Ms. Pailler, the HR person at fault in this case, attends all the hearings, while being a witness, in addition to being the link with Great-West, seems very problematic.

[34] She also argues that the Adjudicator should have excluded the following underlined portion of Mr. Marion's testimony, as reported in the reasons for the decision:

[TRANSLATION]

[67] [Mr. Marion] discussed it at length with [Ms. Dahlander], gave her his opinion on the case's chances of success and pointed out its weaknesses.

[68] Prior to the hearing and in preparation for the case, Mr. Marion had reviewed the case and studied the precedents in matters of dismissal. He provided her with his assessment of the case. If the Employer succeeded in demonstrating that this was indeed a layoff and not a dismissal, his client would lose. In addition, he mentioned to his client that the fact that she had not worked in the last two years since leaving the CBC could be detrimental to her because she had not mitigated her damages.

[Emphasis added.]

[35] The CBC submits that Ms. Dahlander herself implicitly waived privilege in the context of the preliminary objection because she testified that Mr. Marion had exceeded the mandate she had given him and that he had not complied with her July 12, 2021, instructions.

[36] Waiver of solicitor-client privilege is established when the possessor of the privilege knows of the existence of the privilege and voluntarily indicates an intention to waive it (*Canada (Citizenship and Immigration) v Mahjoub*, 2011 FC 887 at para 9 [*Mahjoub*]). There may also be waiver by implication (*Ermineskin First Nation v Canada*, 2011 FC 1091 at para 46). The jurisprudential principles applicable to implied waiver were summarized by the Federal Court in *Mahjoub*, at paragraph 10:

The jurisprudence supports the following propositions relating to implied waiver of the privilege:

- (a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication: *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd* (1983), 1983 CanLII 407 (BC SC), 35 CPC 146, 45 BCLR 218 (SC) (S & K);
- (b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (S & K);
- (c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (S & K);
- (d) the privilege will deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action: *Bank Leu Ag v Gaming Lottery Corp.*,

[1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;

(e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (S & K at paragraph 10).

[37] I am of the opinion that the July 11, 2021 email Ms. Dahlander sent to Mr. Marion and the testimony of Mr. Marion contain information protected by professional secrecy. These are communications between a solicitor and client that involve legal advice or consultation and that the parties consider to be confidential.

[38] However, I am of the opinion that Ms. Dahlander implicitly waived the privilege that applied to communications between her and Mr. Marion regarding the CBC's settlement offer when she testified that Mr. Marion had exceeded the mandate she had given him and that he had not acted in accordance with the instructions she gave him on July 12, 2021. The Adjudicator reported the remarks made by Ms. Dahlander during her testimony:

[TRANSLATION]

[25] Although she confirmed that she had hired Mr. Marion to represent her at the hearing on July 8, 2021, she denied having entered into a settlement agreement. She explained that Mr. Marion told her that she had an obligation to consider the proposed settlement offer, but claimed that she refused it.

...

[29] She explained that she rejected the settlement offer because it was identical to the one she had been offered in mediation two (2) years earlier.

[30] Moreover, she mentioned that she felt distressed when Mr. Marion informed her that he did not want to continue the hearing. He told her that too many people were involved in the case and she would not get justice.

[31] Mr. Marion also told her that he was concerned that the adjudicator would be impressed by the employer's witnesses and urged his client not to proceed with the hearing.

[32] She had no recollection of requesting Mr. Marion to improve on the Employer's settlement offer.

[39] In order for the Adjudicator to make an informed decision on the existence of a transaction, he had to hear Mr. Marion's testimony concerning the discussions he and his client had on July 8, 2021, regarding the issue of the transaction. The information that was disclosed by Mr. Marion during his testimony was necessary to determine whether or not the parties had made a transaction on July 8, 2021. Mr. Marion testified that he explained to his client why he believed that the CBC's offer was a reasonable offer, taking into account the chances of success of her case. These communications between Ms. Dahlander and Mr. Marion were legitimately brought into issue in this case.

[40] With respect to the unredacted email of July 11, 2021, the latter was part of Ms. Dahlander's evidence and was filed during the cross-examination of Mr. Marion by Ms. Dahlander, who asked Mr. Marion to describe the history of their communications via email. While I doubt that privilege in respect of the portions that were not relevant to the preliminary objection was waived, I do not believe that a breach of solicitor-client privilege with respect to this portion was determinative of the outcome of the Adjudicator's decision.

B. *Did the Adjudicator breach the principles of natural justice and procedural fairness by failing to fulfill his duty to assist Ms. Dahlander during the hearing on October 19, 2021?*

[41] Ms. Dahlander argues that the Adjudicator failed to fulfill his duty to assist her given that she was representing herself. She states that the Adjudicator did not explain to her how the October 19, 2021 hearing would proceed and simply said that it would deal with the issue of the transaction and that it would last approximately two hours. In addition, the Adjudicator did not guide her during the hearing.

[42] Ms. Peiller presented a different version of the facts. According to her, before the hearing began, the Adjudicator took the time to explain the course of the day to Ms. Dahlander, including the course of the examinations and cross-examinations and the pleadings. The Adjudicator also took the time to explain each step and how to proceed, and to answer all of her questions throughout the hearing day.

[43] The Quebec Court of Appeal has stated that although [TRANSLATION] “anyone who chooses to act without counsel must accept the disadvantages”, [TRANSLATION] “the principle of the responsibility of a self-represented litigants is tempered by the duty to assist, which falls to the court before which they appear” (*Ménard* at paras 58–59). The court must [TRANSLATION] “assist the litigant by providing them with certain explanations about the process and the ways of doing things”; however, the court’s intervention must guide the litigant generally and when the need arises (*Ménard* at para 59); See also *Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at paras 16–17). It should also be recalled that the Court must assess whether the procedure was fair having regard to all of the circumstances and the ultimate question is

“whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific Railway Company* at paras 54, 56). In this case, Ms. Dahlander has not persuaded me that the Adjudicator breached the principles of procedural fairness. According to the evidence on the record, a few days after the Adjudicator was informed that Mr. Marion was no longer representing Ms. Dahlander, he contacted Ms. Dahlander for a conference call to inform her that the CBC intended to rely on the existence of a transaction. After Ms. Dahlander replied that she was afraid, felt trapped and wanted to try to find a new lawyer, the Adjudicator postponed her case until August 17, 2021, and, after she told him that she was not ready to continue the case, he postponed it until the fall. In addition, Ms. Dahlander was able to present her evidence and cross-examine the witnesses and does not explain how the Adjudicator failed to guide her sufficiently. I am therefore of the opinion that Ms. Dahlander was afforded fair proceedings.

C. *Is the Adjudicator’s decision unreasonable because Ms. Dahlander’s complaint was not settled in writing between the parties, as required by subparagraph 241.2(1)(a)(iii) of the Canada Labour Code?*

[44] Ms. Dahlander argues that the Adjudicator’s decision is unreasonable because the Adjudicator failed to consider the applicable legislative scheme, section 241.2 of *the Canada Labour Code*, which provides that the tribunal may reject a complaint, in whole or in part, if the complaint has been settled in writing between the employer and the complainant. In this regard, Ms. Dahlander submits that her complaint of unjust dismissal was not settled in writing between the parties.

[45] The CBC argues that Ms. Dahlander is attempting to give a much narrower scope to section 241.2 of the *Canada Labor Code*. According to the CBC, the Adjudicator was not required to reject the complaint for the reasons listed in subsection 241.2(1); rather, the discretion to reject a complaint falls within the general powers set out in section 16 of the *Canada Labor Code*, and the Adjudicator could therefore reject the complaint on the basis of the existence of a transaction under article 2631 of the CCQ. In addition, the CBC argues that section 241.2 could not apply to Ms. Dahlander's complaint since that complaint was made before the coming into force of that section.

[46] I agree that there is no need to subject to the interpretation of section 241.2 since that section was not in force when Ms. Dahlander filed her complaint for unjust dismissal under section 240 of the *Canada Labor Code*.

[47] Pursuant to subsection 534(9) of *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27, and the Order Fixing July 29, 2019 as the Day on which Certain Provisions of that Act Come into Force, PC 2019-1110, (2019) C Gaz II, 153, section 241.2 of the *Canada Labor Code* came into force on July 29, 2019, together with the sections of *Budget Implementation Act, 2017, No. 1*, SC 2017, c 20, transferring the adjudication powers under Part III of the *Canada Labor Code* to the Board. Prior to the coming into force of those sections, section 240 provided that a person could make a written complaint of unjust dismissal to an inspector and where a complaint was not settled within such period as the inspector endeavouring to assist the parties considered to be reasonable, the inspector could, on the written request of the complainant, report to the Minister, who could then appoint an adjudicator to hear and adjudicate the matter

(subsection 242(1) of the *Canada Labour Code*, repealed by *Budget Implementation Act, 2017, No. 1*, subsection 354(1)).

[48] Since July 29, 2019, if a complaint is not settled between the parties, the Head must, on the written request of the complainant, refer the complaint to the Board (subsection 241(3) of the *Canada Labor Code*). The wording of section 241.2 gives the Board—and not the adjudicator—the discretion to reject a complaint, particularly where the complaint has been settled in writing between the employer and the complainant.

[49] Section 383 of the *Budget Implementation Act, 2017, No. 1*, provides that the *Canada Labour Code*, as it read immediately before July 29, 2019, applies with respect to any complaint of unjust dismissal made before that date (see also *Gardaworld Cash Services Canada Corporation v Smith*, 2020 FC 1108 at para 90). Since Ms. Dahlander filed her complaint of unjust dismissal on January 30, 2019, and her complaint was referred to an adjudicator under the previous version of the *Canada Labour Code*, the Adjudicator was not required to consider the application of section 241.2.

[50] Therefore, it is my opinion that the Adjudicator's decision is reasonable. After considering the testimony and the particular facts of this case, the Adjudicator analyzed article 2631 of the CCQ and concluded that the parties had made a transaction on July 8, 2021, and rejected Ms. Dahlander's complaint. Under article 2631 of the CCQ, it is not necessary to demonstrate the existence of a written and signed document in order for the transaction to be valid (*Tulli* at para 40). The Adjudicator's decision is justified in relation to the law applicable in

this case and is based on an internally coherent and rational chain of analysis (*Vavilov* at para 85).

D. *Is the Adjudicator's decision unreasonable because he did not sufficiently justify in his reasons why he preferred the testimony of Mr. Marion to Ms. Dahlander's?*

[51] Ms. Dahlander submits that the Adjudicator, when faced with contradictory testimony, failed to explain why he preferred the testimony of Mr. Marion over her own. The Adjudicator found that Mr. Marion's testimony was credible but failed to make a finding on the credibility of her testimony. According to Ms. Dahlander, the Adjudicator rejected her testimony on unfounded generalizations that it would be surprising and inconceivable for Mr. Marion to go beyond his mandate (citing *R v Sheppard*, 2002 SCC 26 at para 45).

[52] I am not persuaded by Ms. Dahlander's argument. In my opinion, the Adjudicator provided detailed justification for the reasons why he did not accept Ms. Dahlander's version in his weighing of her version against Mr. Marion's:

[TRANSLATION]

[134] The Complainant alleged that the Employer's offer was submitted to her for her consideration and review only. After three days of consideration, she decided to refuse the offer and informed Mr. Marion by email.

[135] That argument cannot be accepted.

[136] In order to accept that argument, the Tribunal must set aside the credible testimony of Ms. Pedneault and Mr. Marion to the effect that there was an exchange of consent following discussions between the parties through their counsel.

[137] If the Employer's settlement offer was only for consideration after a cooling-off period, the Complainant's counsel would certainly not have informed the Tribunal that an agreement in principle had been reached between the parties.

[138] The Complainant contended that Mr. Marion told her that she had an obligation to consider the offer, whereas Mr. Marion testified that he told his client that he had an ethical obligation to pass on any settlement offer from the other party.

[139] The Complainant claimed that she refused the proposed settlement offer at all times and told Mr. Marion so.

[140] The Tribunal cannot accept this version. It would be surprising and inconceivable, to say the least, for Mr. Marion to go beyond the mandate given to him by his client and inform the Tribunal that a settlement had been reached when he had not obtained her authorization in this regard.

[141] Moreover, the Tribunal noted that at no time did the Complainant repudiate her counsel for having exceeded his mandate. She still trusted Mr. Marion even after a meeting with Me Dorais and Mr. Marion to, she said, “set the record straight”.

[142] At that meeting, Mr. Marion clearly explained to the Complainant the consequences of not following up on the agreement in principle reached on July 8, 2021. She had no choice but to approve what had already been agreed to. The Employer would argue that a transaction had been made and would be called to testify against her, which would cause her great problems.

[143] At the end of that meeting, the Complainant persisted in her refusal without, however, putting an end to the mandate of Mr. Marion, who then had no choice but to cease representing his client.

[144] The Tribunal also noted that the proposed settlement offer was subject to a monetary counter-offer which led to an increase in the Employer’s initial offer. This clearly indicates a willingness on the part of the Complainant to attempt to settle the case by way of a counter-offer.

[145] After lengthy discussions with his client, Mr. Marion stated that he had his client’s permission to accept the offer.

[146] Mr. Marion, a counsel with 19 years of experience, would certainly not have acted against his client’s instructions.

[147] It is more than likely that Ms. Dahlander, after reflection, changed her mind, no longer being satisfied with the agreement reached three days earlier. This does not invalidate the transaction unless a defect in consent is shown. However, no such evidence was submitted.

[148] Moreover, Mr. Marion's reaction left no doubt as to his client's change of mind.

[53] I am of the opinion that Ms. Dahlander is asking the Court to reassess the evidence that the Adjudicator considered (*Vavilov* at para 125). The Adjudicator weighed the two contradictory versions and reasonably justified in his reasons why he did not accept Ms. Dahlander's version.

VIII. Conclusion

[54] The application for judicial review is dismissed.

JUDGMENT in T-1919-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed without costs.

“Peter G. Pamel”

Judge

Certified true translation
Janna Balkwill

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1919-21

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RADIO-CANADA

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