

Federal Court



Cour fédérale

**Date: 20220923**

**Docket: T-1302-21**

**Citation: 2022 FC 1326**

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

**Ottawa, Ontario, September 23, 2022**

**PRESENT: Mr. Justice Sébastien Grammond**

**BETWEEN:**

**JACQUES GENEST**

**Applicant**

**and**

**LE CONSEIL DE LA NATION  
ATIKAMEKW**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant, Mr. Genest, is seeking judicial review of an arbitration award dismissing his unjust dismissal complaint. The adjudicator appointed under the *Canada Labour Code*, RSC 1985, c L-2, found that Mr. Genest had abandoned his position by failing to report to work for five consecutive days, contrary to a written policy of his employer. I am dismissing Mr. Genest's

application because he has failed to show that the adjudicator breached procedural fairness or that the adjudicator's decision is unreasonable.

[2] Mr. Genest was an employee of the Conseil de la Nation atikamekw [the Council]. He submits that he had arranged with his immediate supervisor to work, on an alternating basis, one week at the Council's office in La Tuque and then one week at his home in Chibougamau. On February 25, 2019, his immediate supervisor told him he had to be in La Tuque during the week of March 11 to 15, 2019.

[3] However, Mr. Genest stayed in Chibougamau during that week and worked remotely. On Thursday, March 14, his immediate supervisor sent him an email reminding him of the Council's policy and asking him to report to the office in La Tuque the following day. When Mr. Genest received this email, he phoned his immediate supervisor. He submits that the supervisor did not explicitly instruct him to report to the office and that there was some ambiguity. He therefore stayed in Chibougamau on Friday, March 15. The following Monday, the Council informed him that it was terminating his employment because he had not reported to his workplace for five consecutive days.

[4] Mr. Genest made an unjust dismissal complaint under sections 240 *et seq.* of the *Canada Labour Code*, as they read at the time, and the matter was referred to an adjudicator.

[5] At the same time as the arbitration proceeding, a dispute arose over Mr. Genest's eligibility for employment insurance in light of his dismissal. The Employment Insurance

Commission ruled in favour of Mr. Genest; however, the Council appealed the case to the Social Security Tribunal. On April 30, 2021, the Tribunal found that Mr. Genest was eligible for employment insurance, as he was not guilty of [TRANSLATION] “misconduct”. In the Tribunal’s opinion, Mr. Genest had not acted deliberately, since the Council had failed to establish that Mr. Genest had been explicitly instructed to report to the office or that he must have been aware he was violating Council policy by working remotely. In short, the Tribunal agreed with Mr. Genest’s argument that there had been a misunderstanding.

[6] The Council raised a preliminary objection before the adjudicator, on the basis that Mr. Genest had resigned and that this precluded an unjust dismissal complaint. The adjudicator agreed to hear the preliminary objection first. The hearing of the preliminary objection took place over three days in May 2021, shortly after the Social Security Tribunal rendered its decision. Two of the three days were devoted to Mr. Genest’s evidence and submissions.

[7] On July 16, 2021, the adjudicator allowed the Council’s preliminary objection and dismissed Mr. Genest’s complaint. He concluded that Mr. Genest had been explicitly instructed on February 25, 2019, to report to the office during the week of March 11 to 15, 2019, and that this instruction overrode any pre-existing remote work arrangement. He also concluded that Mr. Genest had been explicitly instructed on March 14, 2019, to report to the office the following day and was reminded of the policy on absences of five days or more. He considered Mr. Genest’s explanations to be [TRANSLATION] “hard to believe” and rejected the argument that there had been a misunderstanding.

[8] Mr. Genest is now seeking judicial review of the adjudicator's decision. On an application for judicial review, my role is not to repeat the hearing before the adjudicator or to substitute my opinion for that of the adjudicator. Rather, I must determine whether the adjudicator fulfilled his duties under the *Canada Labour Code*. In particular, I must be satisfied that the adjudicator's process was fair and that the adjudicator's decision could reasonably be based on the evidence presented.

[9] Mr. Genest is self-represented and was not represented by counsel before the adjudicator. His main argument in support of his application for judicial review is about the fairness of the hearing process. He states that he was unable to cross-examine the representatives of the Council at the arbitration hearing because he was upset by their testimony. He is simply asking for a second chance to cross-examine these witnesses.

[10] There is nothing to suggest that this situation amounts to a breach of procedural fairness. Mr. Genest is not arguing that the adjudicator prevented him from cross-examining the Council's witnesses. The hearing before the adjudicator was not transcribed, and there is no evidence that Mr. Genest told the adjudicator about his inability to cross-examine or that he made any request to address the situation. From a broader perspective, there is every indication that Mr. Genest had ample opportunity to make his views known to the adjudicator.

[11] It is understandable that a party whose application is rejected would like a second chance. Nevertheless, finality is an essential component of justice. Where a reasonable decision has been

rendered at the end of a fair process, it would be unfair for the successful party to give the losing party a second chance. Both parties must accept the outcome of the case, whatever it may be.

[12] Mr. Genest also attacks the substance of the adjudicator's decision. He states that the adjudicator did not accept his arguments, did not check the documentation he had filed and did not take into account the decision of the Social Security Tribunal. However, on judicial review, it is not enough to argue, without being more precise, that the adjudicator should have rendered a different decision. The evidence that the adjudicator allegedly ignored must be specifically identified and shown to be so inconsistent with the decision as to render the decision unreasonable. It is not the role of this Court to reweigh the evidence before the adjudicator.

[13] The adjudicator accepted the testimony of the Council's representatives and found that Mr. Genest's explanations were not credible. It is not enough for Mr. Genest to reiterate the arguments he made before the adjudicator, namely that his dismissal was the result of [TRANSLATION] "conflicting interpretations of the work schedule" or ambiguity in the conversations with his supervisor on February 25 and March 14. Mr. Genest has failed to show that the adjudicator made an unreasonable decision in rejecting his arguments. He has also failed to show how the adjudicator erred in analyzing the documentary evidence.

[14] Moreover, the adjudicator was not bound by the decision of the Social Security Tribunal. There was no *res judicata*, since the two proceedings were not based on the same cause and did not have the same purpose. In common law provinces, a decision on employment insurance eligibility is not usually considered to determine the outcome of a claim for damages based on

unjust dismissal: *Minott v O'Shanter Development Company Ltd* (1999), 168 DLR (4th) 270 (Ont CA); *City of Saint John v Canadian Union of Public Employees, Local 18*, 2015 NBCA 35.

The adjudicator was clearly aware of the Tribunal's decision. However, Mr. Genest criticized him for failing to examine it in detail or, it would appear, for failing to explain why he was deviating from it. In my opinion, the adjudicator was not required to do this. The adjudicator had to decide the case on the basis of the evidence before him. The evidence before him was much more detailed than before the Tribunal, if only because the hearing lasted three days. The adjudicator analyzed the evidence and reached conclusions that were not unreasonable.

[15] Mr. Genest also pointed out that his dismissal triggered a cascade of unfortunate personal consequences. In particular, he was unable to find a similar job. I do not doubt Mr. Genest's truthfulness in this regard. However, the Court's role in dealing with an application for judicial review is limited, making it impossible for me to ease Mr. Genest's misfortune.

[16] For these reasons, Mr. Genest's application for judicial review will be dismissed. In the circumstances, and given that he has not received the advice of counsel, I consider it fair not to make any order as to costs.

**JUDGMENT in T-1302-21**

**THE COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.
2. There is no order as to costs.

“Sébastien Grammond”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1302-21

**STYLE OF CAUSE:** JACQUES GENEST v LE CONSEIL DE LA NATION  
ATIKAMEKW

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** SEPTEMBER 20, 2022

**JUDGMENT AND REASONS:** GRAMMOND J

**DATED:** SEPTEMBER 23, 2022

**APPEARANCES:**

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FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Benoît Denis

FOR THE RESPONDENT

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