

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120208**

**Dockets: A-265-11  
A-266-11**

**Citation: 2012 FCA 43**

**CORAM: LÉTOURNEAU J.A.  
NOËL J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**ROBERT GRAVEL**

**Appellant**

**and**

**TELUS COMMUNICATIONS INC.**

**Respondent**

Heard at Québec, Quebec, on January 31, 2012.

Judgment delivered at Ottawa, Ontario, on February 8, 2012.

**REASONS FOR JUDGMENT BY THE COURT**

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**REASONS FOR JUDGMENT**

**THE COURT**

**Facts giving rise to these appeals**

[1] These are two appeals consolidated for hearing by an order made on August 16, 2011, by our colleague, Madam Justice Trudel. The appeals were filed against a decision by Justice Beaudry (judge) of the Federal Court in files T-2086-09 and T-2087-09.

[2] By his decision dated June 7, 2011, the judge dismissed both applications for judicial review filed by the appellant in respect of two decisions made by a grievance arbitrator (adjudicator/referee). The first of these decisions was made following an unjust dismissal complaint filed by the appellant against his employer Telus Communications Inc., the respondent in these appeal proceedings. The second decision concerned claims for wages and other benefits which the appellant believed he was entitled to receive in the circumstances.

[3] On November 6, 2009, at the end of a 15-day hearing, the adjudicator/referee concluded, in a highly developed and detailed 184-paragraph decision, that the appellant's termination of employment resulted not from a dismissal, but from a layoff following the respondent's nation-wide restructuring of some of its offered services. According to the adjudicator/referee, this restructuring involved the discontinuance of the positions of [TRANSLATION] "Sales Specialist (SS) attached to the National Applicative Solution (NAS) division of the Telus Solution d' Affaires/Telus Business Solution (TBS) business unit": see paragraph 20 of the adjudication decision dated November 6, 2009. The appellant held one such position. Consequently, the adjudicator/referee determined that he had no jurisdiction to deal with the appellant's unjust dismissal complaint.

[4] The second decision, regarding wage recovery, is dated November 12, 2008, and just as unequivocal as the first. It contains 196 paragraphs of facts and analysis. That decision allowed the employer's appeal, dismissed the employee's appeal (the appellant in these appeals), and

ordered that the employer be reimbursed an amount of \$34 079.55 that had been placed in trust for the appellant.

### **Decision of the Federal Court judge**

[5] The judge hearing the applications for judicial review reviewed the adjudication and wage recovery decisions on the reasonableness standard. He ruled that the adjudicator/referee's conclusions were logical and supported by the evidence, such that his intervention was neither desirable nor warranted in accordance with the legal standards applicable in the matter: see his reasons for decision at paragraphs 19, 30, 32, 36 and 43 to 47.

[6] The appellant also complained that there had been a breach of procedural fairness in the course of the hearings before the adjudicator/referee. To analyze this issue, the judge applied the correctness standard. In his view, the appellant had been unable to meet his burden of proving that there had been a breach of procedural fairness: *ibid.*, at paragraphs 55 to 60. As a result, the applications for judicial review were dismissed.

### **Analysis of the judge's decision**

[7] It can only be deplored that at no time did the appellant have the benefit of representation by attorney, particularly at the crucial stage of the hearing before the adjudicator/referee. The Court therefore informed the appellant of the limits of its powers on appeal from a Federal Court

decision made in judicial review of adjudication and wage recovery decisions. We indicated to the appellant that he had to satisfy us that the judge had either made errors of law or made palpable and overriding errors of fact or of mixed fact and law which would, in fact or in law, warrant our intervention. Last, the Court also told the appellant that, if necessary and subject to the limits imposed by its adjudicative function, it would assist and guide him through the conduct of the hearing.

[8] On appeal, as on judicial review, the appellant faced a colossal challenge. First, the Court must treat adjudication and wage recovery decisions with great deference, and, as the judge quite rightly decided, they are subject to the reasonableness standard for the purposes of intervention: *Dunsmuir v. New Brunswick*, [1008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[9] Second, complaints of the nature of those raised by the appellant rely, as a general rule, largely on questions of fact and necessarily raise issues of credibility which fall within the jurisdiction of the adjudicator/referee. As evidenced by the adjudication and wage recovery decisions, the appellant's case is not an exception to that rule. Indeed, referring to the adjudicator/referee, the judge wrote the following at paragraphs 31, 32, 45 and 46 of his reasons for decision:

[31] The panel had the opportunity to see and hear the parties, assess their credibility and scrutinize the documentary evidence.

[32] The panel supported its findings with reasons and gave specific details as to why it found certain witnesses and documents to be more credible than others.

...

[45] The panel heard the witnesses, weighed the documentary evidence filed by the parties and analyzed each of the applicant's claims and the amounts awarded by the inspector in his payment order.

[46] The panel gives a detailed explanation for accepting Mr. Hamill's testimony regarding how the sales incentive program was applied and why the applicant was not entitled to recognition in the form of trips to Sonora, British Columbia, and Dubai under the President's Club program.

In these circumstances, the reviewing judge cannot substitute his or her own assessment of witness credibility for that of the adjudicator/referee.

[10] Third, in the case at bar, there are no stenographic notes of the hearings before the adjudicator/referee. This lack of stenographic notes not only renders difficult and perilous a determination, made on the basis of contradictory affidavits, of a breach of procedural fairness (see paragraph 56 of the judge's reasons for decision), it also makes it impossible to verify the merits of any allegation purporting that a conclusion by the adjudicator is contrary to the testimonial or even documentary evidence, or is not supported by them. The following example illustrates the difficulty faced by both the judge and the Court.

[11] Partly in support of the argument that he was dismissed with cause, the appellant refers to a letter sent by counsel for the respondent to Johanna Blanchette, an inspector working for the Government of Canada:

[TRANSLATION]

First of all, Telus terminated the employment of Robert Gravel (the “Employee”) for performance and competency reasons following a corporate restructuring. Following this decision by Telus, the Employee was offered a sum as pay in lieu of notice. This sum may be described as generous,

considering that he had acquired 1 year and 10 months’ seniority. It must be noted that, following the corporate restructuring, the position held by the Employee no longer exists.

[Emphasis added.]

[12] There is no doubt that the underlined passage gives rise to differing interpretations.

Counsel for the respondent acknowledged as much at the hearing before us, but asserted and explained that the quoted excerpt had been the subject of a number of testimonies and numerous extensive discussions before the adjudicator/referee. He stated that the term [TRANSLATION] “performance” used in the letter did not refer to the appellant’s performance, but to the respondent’s performance as a business. However, he admitted that the term [TRANSLATION] “competency” did refer to the appellant’s competency, but as it stood on the day following the restructuring, after his position had been discontinued: he did not have the required experience and competency for reassignment within the new structure.

[13] This statement by counsel for the respondent can undoubtedly be verified at paragraphs 43 to 92 of the adjudication decision dated November 6, 2009, in which the adjudicator/referee gave an account of the witnesses’ statements on these two questions and analyzed them. However, without stenographic notes, it is impossible for us to verify the

accuracy of the adjudicator/referee's account or analysis or to make comparisons with the testimonial evidence before us. It is even less open to us to substitute our opinion for that of the adjudicator/referee on the basis of affidavits which attempt to reconstruct or interpret the testimonies received by the adjudicator/referee.

[14] The judge who ruled on both applications for judicial review did not see, in either the adjudication decision or the wage recovery decision, any error of law, of fact or of mixed fact and law in the absence of which the adjudicator/referee could have concluded differently than he did. Our analysis of the adjudication decision and the wage recovery decision, the contentions of the parties and the judge's decision has satisfied us that we have no legitimate legal ground to intervene and set aside his decision.

### **Conclusion**

[15] For these reasons, we are of the opinion that the appeals in files A-265-11 and A-266-11 should be dismissed with costs, limited, however, to one set for the hearing and preparation for



the hearing. A copy of these reasons will be included in file A-266-11 in support of the judgment of the Court.

“Gilles Létourneau”

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J.A.

“Marc Noël”

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J.A.

“Robert M. Mainville”

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J.A.

Certified true translation  
Sarah Burns

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKETS:** A-265-11 and A-266-11

**STYLE OF CAUSE:** ROBERT GRAVEL v. TELUS  
COMMUNICATIONS INC.

**PLACE OF HEARING:** Québec, Quebec

**DATE OF HEARING:** January 31, 2012

**REASONS FOR JUDGMENT BY:** THE COURT (LÉTOURNEAU, NOEL and  
MAINVILLE J.J.A.)

**REASONS DATED:** February 8, 2012

**APPEARANCES:**

Robert Gravel

SELF-REPRESENTED

Jean-François Dolbec

FOR THE RESPONDENT

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FOR THE RESPONDENT