

CITATION: Jessica McGaw v. Sobeys Capital Inc., 2023 ONSC 6279
COURT FILE NO.: CV-21-2045
DATE: 2023 11 03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
 JESSICA McGAW)
) Plaintiff) J.-A. De Bousquet and T. Benstead for the
) Plaintiff)
)
 – and –)
)
 SOBEYS CAPITAL INC.)
)
 Defendant) S. Kelly and K. Mack for the Defendant
)
)
)
)
) **HEARD:** October 26, 2023

2023 ONSC 6279 (CanLII)

ENDORSEMENT

JUSTICE MILLS

[1] After I declared a mistrial in this proceeding for reasons described below, the Plaintiff brought an urgent motion to have me recused from this proceeding on the basis of a reasonable apprehension of bias, alleging a predisposition against the Plaintiff and/or her counsel. She further sought to have the matter remitted for a new trial before a new judge.

[2] Having declared a mistrial in this matter, I am precluded from hearing the new trial. Therefore, an order for the latter relief is superfluous.

[3] I shall only address the motion to have me recused from addressing the one outstanding issue from the initial trial, being costs of the aborted proceeding.

Background

[4] The Plaintiff commenced this wrongful dismissal action, and it was the Plaintiff who filed the Jury Notice.

[5] The Plaintiff alleges she was terminated without just cause and seeks damages, including aggravated and punitive damages for the treatment she claims she was subjected to by the Defendant. The crux of the Plaintiff's claim is that a certain employee fabricated allegations about her behaviour in the workplace and then coerced the other employees to "target" and "gang up" on her, coordinating their stories in an effort to get her fired. She alleges the Defendant failed to conduct a fair and balanced investigation, and that it was undertaken with bad faith.

[6] The alleged "ringleader" who is accused of having acted in concert with other employees to get the Plaintiff fired was on the stand giving his evidence in chief for the defence. The Plaintiff had previously testified that the witness was jealous of her and wanted to take her job, so he fabricated malicious accusations to have her fired. She further testified that he collaborated with and coerced other employees to follow his lead in reporting false allegations to management.

[7] While this witness was on the stand, counsel for the Plaintiff searched called up on their computer images of Charles Manson and then huddled together and laughed between themselves. Evidently, counsel were of the view the witness bore some resemblance to the notorious cult leader who was imprisoned for murder and conspiracy to commit murder, having coerced his followers to kill a number of people.

[8] This was done within a direct sightline of the jury box. It was witnessed by a juror who disclosed it at the first opportunity when it could be reported in a confidential way. The juror indicated he found the behaviour to be very inappropriate and he wanted it brought to my attention.

[9] I was at the time, and I continue to be, of the view that the image and the impression of likening the witness to a manipulative serial killer could not have been dispelled with a limiting instruction to the jury.

[10] I concluded there was no option but to discharge the jury. The Plaintiff was offered the opportunity to proceed by way of judge alone but refused the offer, as is her right. In the circumstances, a mistrial was declared.

Governing Law of Recusal Motions

[11] The presumption of judicial integrity suggests that judges are capable of and indeed obliged to put aside any feelings towards counsel and decide cases solely on their merits.¹

[12] The test for ascertaining a reasonable apprehension of bias is well established.² The apprehension of bias must be reasonable itself and it must be reasonable in the circumstances of the case. It must be held by a reasonable and right minded, fully informed person who is aware of the sworn traditions of judicial integrity and impartiality. It must be founded on serious and substantial grounds considering the strong presumption of judicial integrity and impartiality.

[13] The burden of proof rests with the party making the allegation to establish a reasonable apprehension of bias based on cogent evidence. Allegations or mere suspicions are not sufficient to meet the high threshold required to establish a reasonable apprehension of bias.³ The facts are of “supreme importance” and must be carefully considered having regard to the entire context.⁴ They must reveal a “real likelihood” or “probability” of bias. If this can be established, the judge ought to be disqualified.⁵

[14] Where the facts and the evidence do not establish a real likelihood or probability of bias, the judge ought not be recused. Parties ought not be encouraged to engage in reverse “judge shopping” because of a subjective dissatisfaction with the judge or with previous decisions or directives of the judge.⁶

¹ *R. v. Bukin*, 2021 ONSC 3347, at para. 50(e)

² *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), at para. 394; *Smith v. Duca Financial*, 2016 ONSC 6289, at paras. 17-18

³ *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), at paras. 114 and 117;

⁴ *Roberts v. R.*, 2003 SCC 45, at para 77

⁵ *Smith v. Duca Financial*, *supra*, citing *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 32 C.P.C. (5th) 357 at paras. 4 and 6

⁶ *Ibid.*, at para. 4

Recusal Motion

[15] The Plaintiff raises four “issues” which she alleges give rise to a reasonable apprehension of bias on my part:

- a. Initial statements which I made on the record suggest pre-judgment on the issue of a mistrial;
- b. I required counsel to comment on the note received from the juror, thus requiring them to waive litigation privilege;
- c. I impugned the ethics of Plaintiff’s counsel; and
- d. I accepted the juror’s note at face value.

[16] The Plaintiff has sworn an affidavit stating that after reading the juror note, I looked at her counsel and asked why I should not order a mistrial prior to receiving any submissions on the issue. She also stated that the juror note was never provided to counsel, and it was not entered into evidence. There was a suggestion in the affidavit that I may have fabricated the note from the juror or that the contents of the note were fabricated by the juror. Counsel submits this evidence demonstrates I had pre-judged the matter and summarily ordered a mistrial contrary to the law which states a mistrial should only be ordered as a measure of last resort.

[17] A review of the transcript from the trial readily dispenses with all these statements and suggestions. The juror note was read into the record and marked as a lettered exhibit at the trial.⁷ I invited submissions from counsel as to how this issue could be addressed with the jury. In response, Mr. De Bousquet said “I don’t see why submissions are necessary. I mean, that’s not evidence.”⁸ At no time did counsel deny the contents of the juror note or that an image of Charles Manson was on his computer and visible to the jury while a witness was giving testimony.

⁷ Transcript Excerpt of Proceeding on October 11, 2023, page 1 lines 13-26
⁸ Transcript, page 1 lines 29-30

[18] A lengthy break was taken to allow counsel adequate time to consider the issue. After receiving submissions from both counsel for the Plaintiff and the Defendant, I concluded the prejudice caused to the Plaintiff's case could not adequately be addressed with a limiting instruction to the jury and the mistrial was declared.

[19] The first issue raised by the Plaintiff to establish a reasonable apprehension of bias is without merit and is entirely discredited by the official transcript of the proceeding. Counsel did not obtain a copy of the transcript prior to advancing this argument. The evidence submitted and relied upon by the Plaintiff does not meet the high threshold for establishing a reasonable apprehension of bias.

[20] Regarding the second issue, counsel submits the image of Charles Manson on his computer was subject to litigation privilege as part of his trial strategy. He states that requiring he address the concerns raised by the juror amounted to a demand he waive privilege and divulge his cross-examination strategy for the witness. The submission is that this amounts to an obstruction of counsel's ability to confidentially prepare and then fully present the Plaintiff's case. For this submission, counsel relies on the case of *Gibson v. Labourers' International Union of North America, Local 247*⁹ where it was held by the Labour Relations Board that a zone of privacy exists to facilitate investigation and preparation for a case. If information is gathered within that zone of privacy, it is protected from disclosure to the opposing litigant so as to preserve the adversarial process.

[21] Counsel now submits that the image of Charles Manson on his computer was subject to litigation privilege, and it was part of the Plaintiff's overall litigation strategy. Counsel submits that the witness' appearance was viewed negatively by his co-workers and that his demeanour was considered to be "weird". He asserts that it was his intention to cross-examine the witness and depending on the evidence elicited, use the image of Charles Manson as part of his litigation strategy.

[22] This submission is of great concern. It confirms counsel's intention to discredit the witness before the jury by inviting it to make an adverse inference about his credibility solely based on his

⁹ 2011 CanLII 19649 (ON LRB), at para. 13

appearance; likening it to a known and convicted serial killer. This is absolutely impermissible cross-examination. It plays into stereotypes based only on appearance. It would not have been allowed if counsel had pursued this line of questioning.

[23] Litigation privilege is not absolute. Only those documents and communications for which the “dominant purpose” is litigation are protected by litigation privilege.¹⁰ The purpose is to protect the adversarial process. It is not to be used to shield improper conduct, and “[i]t is not a black hole from which evidence of one’s own misconduct can never be exposed to the light of day.”¹¹

[24] This is a wrongful dismissal action. The physical appearance of any witness was not a material issue for trial. It is inconceivable that searching and calling up an image of Charles Manson on counsel’s computer while a material witness was giving evidence was obtained with the dominant purpose of advancing this litigation on behalf of the Plaintiff. There is no air of reality to this submission. This finding is confirmed by the submissions of counsel for the Plaintiff at the time which was as follows:

“And I submit it’s not improper conduct for counsel to review pictures on the internet in anticipation of testimony. During a trial, lawyers may review documents and evidence, even evidence or documents that are not admissible, which happened here unfortunately. And, again, it’s unfortunate that a juror could see that. There was no testimony or any comments made about [the witness’s] resemblance to anyone else.”¹²

[25] Counsel later confirmed on the record that there was no evidence whatsoever, and that nobody suggested the witness resembled a certain person or that he was mocked by others.¹³

[26] It is improper to now assert litigation privilege over the image of Charles Manson on his computer in an effort to shield the conduct of counsel from scrutiny.

¹⁰ *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52, at para. 19

¹¹ *Moore v. Getahun*, 2015 ONCA 55, at paras. 76 & 77; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 44

¹² Transcript page 7, lines 24-32

¹³ Transcript page 13, lines 11-13

[27] I find the second issue raised by the Plaintiff is without merit and does not meet the high threshold to establish a reasonable apprehension of bias.

[28] With respect to the Plaintiff's third issue raised, she submits that when a judge impugns the ethics of counsel, it is a factor to be considered when assessing whether there is a reasonable apprehension of bias.

[29] In this regard, the Plaintiff relies on her impression that the decision to order a mistrial was the result of my pre-judgement (as referenced above and dismissed as being factually incorrect). She adds that my view of counsel was unfavourable. In my oral reasons for granting a mistrial, I described counsel's behaviour as "inexcusably disrespectful to the witness and highly prejudicial, which in my view is incapable of being remedied with a jury instruction."¹⁴ When addressing the issue of costs, my endorsement the following day stated the mistrial was "directly due to the conduct of counsel". I asked counsel to address Rule 57.07(1)(c), the provision in the *Rules of Civil Procedure* which permits costs to be ordered payable personally by counsel. The plaintiff submits these statements give rise to a reasonable apprehension of bias on my part.

[30] The statements are factually correct. To my knowledge, the Plaintiff herself did nothing to create or contribute to the event which gave rise to the mistrial. The conduct of counsel was disrespectful to the witness and searching images of Charles Manson within view of the jury was highly prejudicial to the Plaintiff, particularly having regard to the nature of the case she was advancing. Contrary to the characterization by Plaintiff's counsel at the time, I did not view this as a "small bump in the road"¹⁵ of the trial. Counsel did concede on the record that had he known the jury could see his computer screen, he would have acted differently, and he assured me it would not happen again.¹⁶

[31] I made no finding at the time, nor do I make any finding now that the conduct of counsel was unethical or in breach of the Rules of Professional Conduct. That is a decision within the strict purview of the Law Society of Ontario. I viewed the conduct as being prejudicial to the fair

¹⁴ Transcript, page 13, line 30 – page 14, line 1

¹⁵ Transcript, page 12, lines 9-10, and lines 13-17

¹⁶ Transcript, page 12, lines 18-21

and proper hearing of the trial. On the record, I expressed my concerns primarily for the Plaintiff, but I also raised concerns of prejudice to the Defendant whose witness, a longstanding employee, was being disrespected by opposing counsel.

[32] Thus I find that the third ground raised by the Plaintiff to establish a reasonable apprehension of bias is without merit. When examined in the entire context of the situation, a careful consideration of the facts does not reveal a real likelihood or probability of bias.

[33] Finally, the Plaintiff suggests that counsel was obstructed from properly testing the evidence of a witness because the juror was not called upon to be cross-examined respecting the contents of the note. She alleges this gives rise to a reasonable apprehension of bias.

[34] There was no request by counsel to have the juror brought forward to be questioned regarding the note. Indeed, counsel stated on the record that speaking to the juror regarding the issue was in the circumstances was probably “overkill”.¹⁷ He was of the view that at most, a midtrial instruction would be adequate to direct the jury they should “disregard any resemblance made between [the witness] and anybody else and disregard their feeling towards counsel”.¹⁸ I disagreed that this was an adequate means by which to address the issue.

[35] The response by counsel when confronted with the juror note left me with no doubt that its contents were accurate. There was no need to cross-examine the juror as to the statements made in the note nor of the image he witnessed on counsel’s computer. The statements contained in the note were largely admitted by counsel when he said “it’s unfortunate that a member of the jury was able to see a picture on our computer and felt that the witness – witness was being mocked, I want to ensure you there was no intention on our part to mock [the witness] or to disrespect the court or the integrity of the process.”¹⁹

¹⁷ Transcript, page 10, lines 18-19

¹⁸ Transcript, page 10, lines 8-10

¹⁹ Transcript, page 7, lines 18-24

[36] Again, when the facts are examined in the context of the circumstances, the fourth issue raised by the Plaintiff is without merit. It fails to meet the high threshold to establish a reasonable apprehension of bias.

Conclusion

[37] The Plaintiff has failed to advance substantial and serious grounds to support an allegation of a reasonable apprehension of bias on my part. I am not satisfied that a reasonable or fair minded person would perceive bias simply because of my decision to declare a mistrial on learning that at least one juror had witnessed counsel laughing and comparing the appearance of a material witness to Charles Manson. Her argument does not disqualify me from making a costs order in respect of the mistrial. The essential purpose of the motion appears to be reverse judge shopping because of a subjective dissatisfaction with my decision to declare a mistrial.

[38] The Plaintiff's motion is dismissed.

Costs

[39] The Defendant was called upon to respond to this urgent motion, which was in fact not urgent. The only urgency related to the outstanding costs decision from the mistrial. I am satisfied the Plaintiff brought this motion with the sole purpose of avoiding a costs decision arising from the mistrial. The motion was wholly without merit. The Defendant is entitled to its costs of this motion on a substantial indemnity basis. I will receive submissions as to the appropriate quantum limited to two pages plus a Costs Outline. The Defendant shall have seven days from today; the Plaintiff shall then have seven days thereafter to respond. There shall be no right of reply.

J. E. Mills J.

Released: November 3, 2023

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JENNIFER MCGAW

Plaintiff

– and –

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Defendant

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J.E. Mills J.

Released: November 3, 2023