Federal Court  Cour fédérale

Date: 20150123

Docket: T-1557-13

Citation: 2015 FC 93

BETWEEN:

DHARAMJIT SINGH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

I. INTRODUCTION

[1] Mr. Dharamjit Singh (the "Applicant") seeks judicial review, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of Chief Justice J. Michael MacDonald, Chairperson (the "Chairperson") of the Judicial Conduct Committee of the Canadian Judicial Council (the "Council"). In that decision, dated August 23, 2013, the Chairperson dismissed the Applicant's complaint against several judges of the Ontario Superior Court of Justice and the Ontario Court of Appeal.

[2] The Chairperson is represented in this proceeding by the Attorney General of Canada as the Respondent (the "Respondent") pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules").

II. BACKGROUND

[3] The Applicant is a lawyer practising in Toronto. He represents a former employee of Federal Express Canada in an action commenced in the Ontario Superior Court of Justice on October 19, 2007, being cause number 07-CV-342097 PD3 between Nazir Ghany as the Plaintiff (the "Plaintiff") and Federal Express Canada Ltd., Pina Starnino, Norm Jaschinski, Murray Uren, Connie De Fino, Donald Box and Chinh Tang as the Defendants (the "Defendants").

[4] In general, the Plaintiff alleges in his Statement of Claim that he was constructively dismissed by Federal Express. He claims that he is a "whistleblower" disclosing numerous violations of Canadian and American customs and trade law by Federal Express. In his opinion, the violations committed by Federal Express are injurious to the national security of both Canada and the United States. He alleges that the violations were condoned by collusion with border security agencies in both countries.

[5] By Notice of Motion dated July 7, 2008 the Plaintiff sought leave to amend his Statement of Claim by adding Frederick Smith and David Bronczek as Defendants and amending his pleadings relative to the tort of retaliatory discharge and wrongful dismissal. The motion was

heard before Master McAfee of the Ontario Superior Court of Justice on several days between October 2008 and March 2009.

[6] In a decision issued on August 10, 2009, Master McAfee denied leave to make several amendments, largely with respect to adding certain parties as defendants. The Master granted leave to make some amendments, most of which were consented to by counsel for the Defendant.

[7] The Applicant, as counsel for the Plaintiff, appealed the Master's decision to the Ontario Divisional Court. By Endorsement dated April 20, 2010, Justice McCombs denied the appeal. The Applicant sought leave to appeal that decision to the Ontario Court of Appeal. On August 20, 2010, Justice Rosenberg, Justice Goudge and Justice Feldman, all Judges of the Ontario Court of Appeal, denied leave to appeal, without reasons.

[8] On February 5, 2013, the Applicant submitted a complaint to the Canadian Judicial Council against Master McAfee, Justice McCombs, Justice Rosenberg, Justice Goudge, Justice Feldman, as well as against the then Chief Justice of Ontario, Chief Justice Winkler. The complaint was filed on behalf of the Applicant in his own right, not on behalf of his client.

[9] In his complaint, the Applicant alleged that the Judges had ignored binding jurisprudence, applied incorrect jurisprudence, ignored facts and submissions, engaged in case fixing and acted in a corrupt and biased manner for the benefit of the government in dealing with the Plaintiff's motion and the appeal from the decision of Master McAfee. He also alleged that the named

Judges are part of a secret cadre of corrupt judges, relied upon by the then Chief Justice of Ontario to make decisions favourable to the government.

[10] The Applicant attached a number of exhibits to his complaint, purporting to support his allegations. The exhibits consist mainly of news articles, pleadings, transcripts of cross-examinations related to or filed in the Ontario action, and judicial decisions made relative to the motion to amend the Statement of Claim. By means of an email sent to the Council on February 14, 2013, the Applicant submitted more exhibits, including the cross-examination of Susan Foster, various documents relating to customs violations, the amended statement of claim and the decisions of Master McAffee and Justice McCombs.

[11] By letter dated August 23, 2013, Mr. Sabourin, Executive Director of the Canadian Judicial Council, communicated the decision of the Chairperson, Chief Justice MacDonald to the Applicant. That decision informed the Applicant that the Council lacked jurisdiction to consider the complaint against Master McAfee and further advised that the complaint against the other named individuals would be dismissed.

[12] The decision of the Chairperson acknowledges the evidence submitted by the Applicant in support of his argument that the negative decisions on the disputed motion and subsequent appeals were the result of case fixing and the exercise of government influence over the judiciary. The Chairperson advised that there was no evidence to support the Applicant's allegations that something "crooked" had occurred. Further, there was no evidence to show that any of the judges involved with the Applicant's motions and appeals acted improperly.

[13] The Chairperson also stated that there was no evidence relating to Chief Justice Winkler in respect of the disputed motions and appeals. Chief Justice MacDonald found that the evidence submitted by the Applicant showed that the arguments of his client had been presented and independently considered by the Judges in accordance with their usual processes. The Chairperson found that the Applicant's complaint was no more than a disagreement with the adverse decision. There was nothing to suggest that the Applicant's arguments, on behalf of his client, had not been considered and decided upon their merits.

[14] Mr. Sabourin also advised that the allegation against Chief Justice Winkler required consideration by a different process pursuant to section 6.1 of the Council's *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges* (the "Complaints Procedures"). Advice was sought from external counsel. The Executive Director advised that external counsel agreed with the decision to dismiss the complaint.

[15] The Applicant initially raised an issue as to the propriety of the Council deciding to withhold the legal opinion provided by external counsel. Subsequent to delivery of the judgment of the Supreme Court of Canada refusing leave to appeal in *Slansky v. Canada (Attorney General) et al.*, [2013] S.C.C.A. 452, counsel for the Applicant advised that this issue would not be pursued.

[16] Similarly, the Applicant withdrew his challenge to the constitutionality of the decision and the judicial complaints process. In this regard, the Applicant had advanced arguments that the decision and the complaints process offended sections 7 and 15 of the *Canadian Charter of*

Rights and Freedoms, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

III. ISSUES

[17] This application for judicial review raises the following two issues:

(1) What is the applicable standard of review; and

(2) Did the Council err in concluding that it did not have jurisdiction to deal with the Applicant's complaint?

IV. SUBMISSIONS

A. *Standard of Review*

[18] Both the Applicant and the Respondent submit that the Chairman's decision not to deal with the complaint on the basis of a lack of jurisdiction is reviewable on the standard of reasonableness; see the decision in *Akladyous v. Canadian Judicial Council* (2008), 325 F.T.R. 240 at paragraph 42.

(1) Did the Council err in concluding that it did not have jurisdiction to deal with the Applicant's complaint?

B. *Applicant's Submissions*

[19] Concerning the second issue raised in this application for judicial review, the Applicant focuses on the decision of Justice McCombs, of the Ontario Divisional Court. Broadly speaking,

he argues that this decision was not made in accordance with the rule of law. Further, he submits that the decision demonstrates bias by applying the wrong legal test and by not properly dealing with the evidence.

[20] The Applicant argues that the Council erred in concluding that it did not have jurisdiction to review either the evidence or judicial decisions made on the facts and the law. He submits that the Council has jurisdiction to sanction judges where there is an abuse of office, bias, or a reasonable apprehension of bias.

[21] The Applicant submits that the jurisprudence of the Council supports his argument that the Council has jurisdiction to review judicial decision-making. In this regard, he relies on the Council's decisions in the inquiries into the conduct of Justice Matlow and Justice Cosgrove, and the decision of the inquiry committee that was formed to investigate the conduct of the five judges of the Nova Scotia Court of Appeal who overturned the wrongful conviction of Donald Marshall, Jr.

[22] The Applicant argues that these decisions show that judges may be removed from office for incompetence based on the decisions they made, or where there is evidence of bias or a reasonable apprehension of bias in judicial decision making.

[23] The Applicant submits that Justice McComb's failure to follow the doctrine of *stare decisis*, which is the basis of the common law system, constitutes sanctionable conduct and violates the rule of law.

[24] The Applicant also argues that the Chairman's conclusion that the Council lacks jurisdiction to deal with the complaint is not supported by reasons that stand up to a somewhat probing examination. Accordingly, that the decision is unreasonable; see the decision in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

[25] The Applicant submits that even if the Council does not have jurisdiction on these facts, to deal with the Applicant's complaint, it was unreasonable to conclude that it never had jurisdiction to review judicial decision making. He argues that the Chairman's decision fails to address this issue, and therefore the decision is unreasonable.

C. *Respondent's Submissions*

[26] The Respondent submits that the Applicant, in his arguments, has conflated the notion of judicial conduct with the concept of judicial decision-making. He says that the mandate of the Council is limited to investigating allegations of improper judicial conduct. The Applicant is complaining about judicial decision-making, which is beyond the jurisdiction of the Council.

[27] The Respondent acknowledges that judicial conduct and improper decision-making are not always mutually exclusive, and that there will be cases, such as the case of Justice Cosgrove, where improper conduct co-exists with, and impacts upon, judicial decision-making. He submits that the present matter is distinguishable because in this case, there are no allegations of improper judicial conduct.

[28] The Respondent submits that errors of law should be corrected by appellate courts, and that absent allegations of improper conduct, the Council does not have a role in reviewing decisions of judges. In this regard, the Respondent relies on the decision of the Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at paragraph 58.

[29] The Respondent argues that permitting review of judicial decisions by the Council would result in a review by a body that is not an appellate court. He submits that such a scenario would violate the rule of law and the principle of judicial independence that requires judges to hear and decide cases without fear of external sanction.

[30] Finally, the Respondent submits that the Chairman's decision is reasonable. The Chairman's decision was made following careful examination of the complaint. The Chairman then concluded that the Applicant was attempting to re-litigate issues that had already been finally decided.

[31] The Respondent argues that the reasonableness of the decision must be evaluated in the context of the complaint, which involved allegations of judicial corruption and case-fixing, in addition to allegations of improper decision-making. Based on the record before him, the Respondent argues that the Chairman's decision was reasonable.

V. DISCUSSION AND DISPOSITION

[32] On the issue of the appropriate standard of review, I agree with the parties that the Chairman's decision not to deal with the Applicant's complaint is reviewable on the standard of reasonableness. In *Akladyous, supra* the Court applied the standard of patent unreasonableness, pursuant to the prevailing jurisprudence.

[33] In its subsequent decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 45, the Supreme Court of Canada established that there are only two standards of review, that is correctness for questions of law and reasonableness for questions of fact and of mixed fact and law. Further, the Supreme Court of Canada held that it was unnecessary to conduct a full standard of review analysis where the standard of review had been determined by previous jurisprudence; see *Dunsmuir, supra* at paragraph 57.

[34] The issue before the Chairman was a question of mixed fact and law, that is, whether there was judicial misconduct that would warrant investigation by the Council. The Chairman's conclusion that the Council did not have jurisdiction to deal with the complaint was based on a finding of fact that there was no judicial misconduct by any of the judges named in the Applicant's complaint.

[35] Questions of mixed fact and law are entitled to deference and have been previously determined to be subject to review on the reasonableness standard; see the decisions in *Taylor v. Canada (Attorney General)* (2001), 212 F.T.R. 246 at paragraphs 32 and 38, aff'd [2003] 3 F.C.

3, leave to appeal to the Supreme Court of Canada refused, (2004), 321 N.R. 399 (Note); *Cosgrove v. Canadian Judicial Council* (2007), 361 N.R. 201 at paragraph 25 (F.C.A.) and *Akladyous, supra* at paragraphs 40-43.

[36] The content of the standard of reasonableness is addressed in *Dunsmuir, supra* at paragraph 47, where the Court held that reasonableness requires decisions to be justifiable, transparent and intelligible and fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[37] The Applicant argued that the decisions of the Council constitute jurisprudence and that the Chairperson erred in failing to follow that "jurisprudence" and in my opinion, this argument must fail.

[38] According to *Black's Law Dictionary,* 10th ed, *sub verbo* "jurisprudence" the modern usage of the word refers "… 4. Judicial precedents considered collectively… 6. A system, body, or division of law… 7. CASELAW [*sic*]." Caselaw is defined as "the law to be found in the collection of reported cases that form all or part of the body of law within a given jurisdiction"; see *Black's Law Dictionary, supra, sub verbo* "caselaw."

[39] The Council is a federal tribunal; see the decision in *Douglas v. The Attorney General of Canada et al., 2014 FC 299* at paragraph 92. When judges sit as members of the Council and as members of inquiry committees that may be constituted pursuant to Part II of the *Judges Act*, R.S.C. 1985 c. J-1 (the "Judges Act") in spite of their professional training and experience, they

are not acting in their judicial capacity. Rather, they are serving as members of an administrative tribunal; see the decision in *Douglas, supra* at paragraph 86.

[40] Accordingly, decisions of the Council must be treated in the same manner as those of any federally constituted administrative board, commission or other tribunal, that is, its decisions do not create binding precedent, nor is it bound by the doctrine of *stare decisis*; see the decision in *Domtar Inc. v. Quebec (Commission d'appel en matière de lesion professionnelles)*, [1993] 2 S.C.R. 756.

[41] Accordingly, in my opinion, the Council's decisions do not constitute "jurisprudence" within the ordinary meaning and usage of that word and have no precedential value, as per the decision in *Domtar, supra*.

[42] I now turn to the merits of the application. The reasonableness of this decision is to be addressed against the nature of the decision-making process and the evidence submitted to the decision-maker.

[43] In this case, the judicial review application relates to the decision of the Chairperson to dismiss the Applicant's complaint at a preliminary stage.

[44] In *Douglas, supra*, Mr. Justice Richard Mosley reviewed the process followed by the Council in responding to a complaint against federally appointed judges. In paragraphs 9 through 19, he described the process that is followed upon receipt of a complaint.

[45] Justice Mosley outlined a five-step process. Paragraphs 13 and 14 are relevant to the present case, and provide as follows:

> 13. First, the Executive Director of the [Council] completes an initial screening of all complaints and determines whether any complaint warrants opening a file, as set out in section 2.2 of the Complaints Procedures. If no file is opened, the complainant is informed and the matter goes no further. This initial screening serves to avoid the Council devoting time to complaints that are without substance.
>
> 14. Second, if a file is opened the Chair or Vice-Chair of the Judicial Conduct Committee reviews the complaint and may close the file, seek additional information from the complainant, or seek the judge's comments as well as those of their chief justice as prescribed by sections 3 to 8 of the Complaints Procedures.

[46] Pursuant to the Complaints Procedures, the Council may dismiss a complaint at the second stage where it is "outside the jurisdiction of the Council because it does not involve conduct."

[47] The complaint of the Applicant was decided at the second stage; that is, following review by the Chairperson of the Judicial Conduct Committee. The complaint was initially screened by the Executive Director and then was referred to the Chairperson of the Judicial Conduct Committee. As per the decision that was communicated by the Executive Director, the Chairperson found no basis to proceed further. The decision noted that essentially, the Applicant was complaining about the manner in which the Courts had dealt with a motion to amend a Statement of Claim.

[48] In order to address the Applicant's submissions, it is necessary to consider the mandate of the Council.

[49] The Council came into existence with the enactment of subsection 59(1) in Part II – Canadian Judicial Council of the Judges Act. The Council was created with the intention of addressing problems arising from the fact that previously, the Senate and the House of Commons were tasked with conducting judicial disciplinary investigations; see the discussion in *Douglas, supra* at paragraphs 5-6.

[50] The objectives of the Council are set out in subsection 60(1) of the Judges Act. These objectives include the promotion of efficiency and uniformity and improvement of the quality of judicial service. Pursuant to paragraph 60(2)(c), the Council is authorized to conduct an inquiry as to whether a judge should be removed from office. The reasons for which a judge may be removed from office are set out in subsection 65(2) of the Judges Act, which provides as follows:

65.(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of	65.(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :
(a) age or infirmity,	a) âge ou invalidité;
(b) having been guilty of misconduct,	b) manquement à l'honneur et à la dignité;
(c) having failed in the due execution of that office, or	c) manquement aux devoirs de sa charge;
(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that	d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

> office,
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[51] In my opinion, this section makes it clear that the Council's mandate is limited to reviewing improper judicial conduct that affects the ability of judges to execute his or her duties as a judge. It does not include broad jurisdictional power to review the decisions and judgments of judges.

[52] In the present matter, the Chairman found that there was no evidence presented to support a finding of improper judicial conduct. As such, I find that the Council did not err in concluding that it did not have jurisdiction to review the decision of Justice McCombs.

[53] The conclusion of the Chairperson as to the merits of the complaint are set out in the following paragraph:

> For these reasons, Chief Justice MacDonald finds your complaint is entirely unfounded. He is of the view that you are using the complaint process of the Council to once again challenge the legal decisions that were taken and to again present your legal arguments, suggesting that no sensible person could disagree. However, the Council has no mandate to review the conclusions and findings of judges made after hearings. Such matters fall under the judges' decision-making responsibilities, and if they are to be challenged, should be challenged on appeal.

[54] The decision characterized the nature of the complaint as dissatisfaction with the conduct of civil litigation. The decision specifically addressed the allegation of impropriety that had been

raised by the Applicant and found no evidence to support those allegations. It clearly addressed and answered the allegation of "case fixing" and found no basis to support those allegations.

[55] The Applicant alleges that Justice McComb's failure to follow precedent violates the rule of law and such decision-making constitutes improper conduct that is within the jurisdiction of the Council to review.

[56] The Applicant is here challenging decisions relative to interlocutory steps in his client's action. I agree with the argument of the Respondent and the conclusions of the Chairman that the proper way to challenge such decisions is by way of appeal. The Applicant applied for leave to appeal which application was dismissed by the Ontario Court of Appeal.

[57] In my opinion, the issues that the Applicant is complaining about have been finally decided and absent evidence of improper judicial conduct, the decision of Justice McCombs cannot now be challenged by means of a Council inquiry.

[58] I note that the Respondent seeks costs in an elevated amount against the Applicant, on the grounds that the Applicant has pursued several avenues, unsuccessfully, relative to the subject of his complaint; that is, the motion to amend the Statement of Claim. In this regard, the Respondent refers to the Applicant's appeal before the Divisional Court, his application for leave to appeal to the Ontario Court of Appeal, his complaint to the Council and the within application for judicial review.

[59] I am not disposed to award elevated costs in this case. The Applicant was entitled to pursue his appeals within the Ontario Court system and to exercise his rights under the Judges Act, as well as pursuing an application for judicial review.

[60] In doing so, the Applicant assumed the usual risks of litigation, that is the risks of non-success and exposure to costs.

[61] In accordance with the general rule that costs follow the event, this application for judicial review is dismissed with costs to the Respondent, in accordance with the Judgment that was issued on December 19, 2014.

"E. Heneghan"
Judge

Ottawa, Ontario
January 23, 2015

FEDERAL COURT

SOLICITORS OF RECORD

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