Federal Court Cour fédérale

Date: 20160915

Docket: T-748-16

Citation: 2016 FC 1043

Ottawa, Ontario, September 15, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

WARD CHICKOSKI

Applicant
(Responding Party)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Moving Party)

ORDER AND REASONS

[1] The Court is being asked, on a motion by the Respondent pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, to strike the Applicant's judicial review application on the basis of prematurity.

[2] The Applicant occupies the position of Regional Director General, Prairie Region, Regions and Programs Branch (the RP Branch), at Health Canada. On January 6, 2016, he grieved the decision of the Senior Director General of the RP Branch Mr. Peter Brander, dated December 16, 2015, which provided him with a Performance Improvement Action Plan (Action Plan). The Applicant claimed that this decision constitutes a “disguised, if not explicit, disciplinary action resulting in a financial penalty” within the meaning of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 (the Act). He also claimed that this decision was one of several actions, going back to 2014, of psychological bullying towards him on the part of Mr. Brander, which amount to workplace violence within the meaning of Part XX of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (the Regulations) established under the *Canada Labour Code*, RSC 1985 c L-2.

[3] The Applicant requested the following corrective actions:

1. The immediate appointment of a “competent person” pursuant to section 20.9 of the Regulations for the purposes of investigating the alleged incidents;

2. The recession of the Action Plan;

3. An acknowledgment that Mr. Brander’s decision to provide him with the Action Plan is unwarranted, unreasonable and contrary to the Directive on the Performance Management Program for Executives;

4. An acknowledgment that Mr. Brander has subjected him to harassment;

5. An acknowledgment that Mr. Brander’s decision to provide him with the Action Plan constitutes a disciplinary action resulting in a financial penalty;

6. An acknowledgment that Mr. Brander's actions are contrary to and in violation of the *Values and Ethics Code for the Public Service* and the employer's obligations regarding the health and safety of employees; and

7. Full redress, including monetary redress to remedy the financial penalty sustained and the mental distress suffered.

[4] On April 12, 2016, the Applicant's grievance was dismissed at the final level of the grievance procedure on the ground that his request for corrective measures could only be addressed, pursuant to paragraph 208(2) of the Act, through the Violence in the Workplace complaint process established under Part XX of the Regulations, and was, in any event, in some respect, untimely. Paragraph 208(2) bars an employee from presenting a grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*, RSC 1985 c H-6. Throughout the grievance process, the Applicant has been insisting that his request for corrective measures was both a grievance under the Act and a complaint under Part XX of the Regulations.

[5] On June 22, 2016, the Applicant filed an application for judicial review against the decision denying his grievance. He claims that this decision is fatally flawed in two respects. First, the decision violated the principles of natural justice as the Respondent failed to provide him with the opportunity to be heard before the decision was made at the final level of the grievance procedure and failed to disclose the briefing materials that formed the basis of the decision. Second, the Applicant submits that the decision was based on an unreasonable interpretation of subsection 208(2) of the Act. The Applicant contends in this regard that contrary to the Respondent's interpretation, his Violence in the

Workplace complaint under Part XX of the Regulations does not provide him with real and beneficial remedies akin to those he is seeking under the grievance he filed under the Act.

[6] The Respondent is moving to have the Applicant's judicial review application struck out on the basis that the Applicant has not exhausted all the administrative recourses available to him. In particular, it contends that the Applicant ought to have exhausted his remedies under the complaint process established under Part XX of the Regulations.

[7] In addition, and alternatively, the Respondent submits that to the extent the Applicant claims that Mr. Brander's decision amounts to a disciplinary action resulting in a financial penalty, his challenge of the decision of the final level grievance procedure ought to have been brought before the Public Service Labour Relations Board as per paragraph 209(1)(b) of the Act, before being brought to this Court. The Respondent further submits that to the extent he grieves his 2014-2015 performance assessment, the Applicant failed to file his grievance within the appropriate limitation period since according to paragraph 68(1) of the *Public Service Labour Relations Regulations*, SOR/2005-79, such grievance must be filed "no later than 35 days after the earlier of the day on which the grievor received notification and the day on which the grievor had knowledge of the alleged violation or misinterpretation or any occurrence or matter affecting the grievor's terms and conditions of employment."

[8] Striking out a judicial review application on a preliminary motion is an exceptional measure as the usual way to challenge a matter that a respondent thinks is without merit, is to appear and argue the matter at the hearing itself (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 FC 588 at para 10 (CA) [*David Bull Laboratories*]; *Boulos v Canada (Attorney General)*, 2012 FC 292, at para 15 [*Boulos*]). This is so because of the nature of such proceedings, which are designed to proceed expeditiously.

[9] In order to strike a notice of application for judicial review, the Court therefore, needs to be satisfied that the notice of application is "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories*, at para 15; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc,* 2013 FCA 250, at para 47 [*JP Morgan*]).

[10] The Respondent is correct in saying that premature proceedings have been held to fall within this narrow exception which allows for the stricking out of judicial review applications on preliminary motions. Indeed, this Court has consistently declined jurisdiction in cases "where the process before the tribunal has not been exhausted" (*Boulos,* at para 17). This principle was described as follows by Justice David Stratas in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [*CB Powell*]:

> [31] […] absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing

> administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, supra at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 (CanLII) at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 1993 CanLII 3430 (ON SCDC), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun,* supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 1995 CanLII 1305 (BC CA), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 1991 CanLII 7126 (ON SC), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 at paragraph 48.

[11] As indicated previously, the Respondent's main argument is that the Violence in the Workplace complaint process should be allowed to follow its regular course without interruption and intervention of the Court at this stage since the Applicant's entire grievance is being treated by the employer as a complaint under Part XX of the Regulations. The Respondent further argues that if the Applicant is not satisfied with the outcome of that process, he will still have the opportunity of challenging it by way of a judicial review application.

[12] It seems that much of this case boils down to the characterization of the Applicant's grievance. According to the Applicant, his grievance has two separate components: one that engages section 208 of the Act, the other, Part XX of the Regulations. For the employer, the entire grievance amounts to a workplace violence matter engaging solely the complaint process established under the Regulations and does not require as a result, any consideration from the Act's perspective. The Applicant contends that the employer's characterization – or mischaracterization - of his grievance deprives him access to personal remedies that are available under the Act but not under the Regulations.

[13] His main contention in this regard as I understand it, is that the employer proceeded to that characterization in violation of the principles of natural justice. This Court has found in the past that once a grievance has been dealt with at the final grievance level as is the case here, the grievor can seek judicial review in this Court of the final level grievance decision provided it is not referable for adjudication (*Canada (Attorney General) v Assh*, 2005 FC 734, at para 12).

[14] In *Price v Treasury Board (Canada),* T-1074-13 (March 31, 2014) [*Price 1*], Justice Mary Gleason, now a judge of the Federal Court of Appeal, found that the Public Service Labour Relations Board lacks jurisdiction to determine whether a grievor has been denied procedural fairness during the grievance procedure, including the final grievance level. She held that such claims are not referable for adjudication and must therefore be made to the Court.

[15] Here, the Applicant argues that he was not provided with an opportunity to be heard by the final grievance level decision-maker. In particular, he claims that some briefing material provided to the decision-maker before she entered an informal discussion with him and prior to releasing her decision was not disclosed to him. This briefing note directed the decision-maker to deny the grievance and not address its merits since the Applicant's complaint under Part XX of the Regulations precluded him from the grievance process pursuant to subsection 208(2) of the Act.

[16] The Applicant argues based on this Court's decision in *Price v Canada (Attorney General)*, 2015 FC 696 [*Price 2*], that it was improper for the decision-maker to come to her decision without providing him with the opportunity to make submissions on this point and without providing him with this briefing material. In *Price 2*, the applicant was not provided with certain information that was before the decision-maker. The Court found that it was improper "for the decision-maker to decide his grievance on the basis of documents and materials that were not disclosed to the Applicant" (at para 33). The Court found that:

> [34] The purpose of the procedural fairness principle is to allow an interested or affected person to know the case that he or she has to meet. The duty of fairness requires that decision-makers disclose the information they have relied on in reaching their conclusions so that parties have the opportunity to address evidence that is prejudicial to their case; see the decisions in *May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 S.C.R. 809 at paragraph 92 and *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (CanLII), [2002] 4 S.C.R. 3 at paragraph 40.

[17] It seems therefore, that the Applicant's procedural fairness contention was properly brought before the Court as it not referable to adjudication and relates to a final grievance level decision. I am also satisfied based on *Price 2*, that this contention is not "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories*, at para 15; *JP Morgan*, at para 47).

[18] The Respondent relying on *CB Powell*, claims that procedural fairness concerns are not exceptional circumstances allowing parties to bypass an administrative process. However, the Federal Court of Appeal in *CB Powell* indicated that such was the case "as long as that process allows the issues to be raised and an effective remedy to be granted" (*CB Powell*, at para 33). *CB Powell* was decided in a different statutory setting than the one applicable in the present case. Here, as Justice Gleason pointed out in *Price 1*, procedural fairness concerns in the context of the application of the Act are not referable to adjudication as the Public Service Labour Relations Board lacks jurisdiction to rule on such issues. Therefore, the Act's administrative grievance process does not allow for procedural fairness issues to be raised and for an effective remedy to be granted.

[19] In its reply to the procedural fairness argument made by the Applicant, the Respondent asserts that there was no breach of the principles of natural justice as the Applicant was provided with the opportunity to consider different options and to decide on the recourse available to him. This determination is best left to be dealt with by the application judge who will have the benefit of a full record.

[20] The disclosure of the relevant information could well influence the disposition of the Applicant's grievance and in particular, its whole characterization. In turn, this could well influence whether the Applicant's grievance is premature or not and as the case may be, to what extent it is.

[21] The Respondent's motion is therefore dismissed.

[22] The Applicant claims that the motion should be dismissed with a "costs sanction" on the ground that it is clearly without merit. I disagree. Pursuant to Rule 400 of the *Federal Courts Rules*, costs are in the entire discretion of the Court and I find that the normal rules should prevail in the present instance. Costs on the motion are therefore awarded to the Applicant and shall be payable in any event of the cause. They shall be assessed under Column III of the table to Tariff B.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed;

2. With costs to the Applicant payable in any event of the cause;

3. The timelines provided for under the *Federal Courts Rules* applicable to all subsequent steps in these proceedings shall be calculated, unless ordered otherwise by the Court, from the date of the present Order.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-748-16
STYLE OF CAUSE:	WARD CHICKOSKI v ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

ORDER AND REASONS:	LEBLANC J.
DATED:	SEPTEMBER 15, 2016

SOLICITORS OF RECORD:

Kelly Santini, LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT (RESPONDING PARTY)
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT (MOVING PARTY)