Federal Court Cour fédérale

Date: 20190919

Docket: T-2060-17

Citation: 2019 FC 1190

Ottawa, Ontario, September 19, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

GABRIEL FONO

Applicant

and

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Gabriel Fono, the applicant, appeals the decision rendered on September 5, 2018, by Madam Prothonotary Aylen in relation with two motions presented by the respondent, Canada Mortgage and Housing Corporation [Canada Mortgage].

[2] In a single decision rendered for both motions, Madam Prothonotary Aylen struck out four paragraphs of Mr. Fono's *Notice of Application for Judicial Review* (*Application*), with leave to amend three of those paragraphs, as well as several paragraphs of the affidavit of June 19, 2018 he filed in support of his *Application.*

[3] Madam Prothonotary Aylen further ordered both motion records of the parties, and the original *Application* to be sealed, and that new public versions of the documents be filed by September 26, 2018. By the same deadline, Mr. Fono was also ordered to file a fresh affidavit removing the impugn paragraphs.

[4] Hence, in the present appeal, Mr. Fono challenges Madame Prothonotary Aylen's decision to strike paragraphs 2 and 37(k) of his *Application* while disallowing his proposed amendments at paragraph 2(c) and (d), and to strike paragraphs 168, 169, 170, 186, 187, 188, 189, 190 and 211, as well as one sentence of paragraph 101(k) of the affidavit he filed in support of his *Application*. Furthermore, Mr. Fono challenges Madame Prothonorary Aylen's order to strike paragraphs 5 and 6 of his *Application*, with leave to amend, despite the fact that he and Canada Mortgage had consented to the said order.

[5] Finally, Mr. Fono challenges Madam Prothonotary Aylen's sealing order, calling it a blanket sealing order of all material referring to offers to settle made in mediation or made privately between the parties, as well as her award on costs for an amount of $1,500.00, inclusive of disbursements and taxes.

[6] For the reasons exposed hereafter, the appeal will be dismissed.

II. BACKGROUND

[7] From 2007 to 2014, Mr. Fono was employed by Canada Mortgage first as an auditor and, subsequently, as a senior auditor.

[8] In 2014, Canada Mortgage terminated Mr. Fono's employment without cause. Mr. Fono filed a complaint relating to his termination under the *Canada Labour Code*, RSC 1985, c L-2 [*Labour Code*] and his complaint was referred to a *Labour Code* adjudicator.

[9] After the hearing before the adjudicator began, the parties consented to proceed to mediation before her. The adjudicator explained to the parties that all offers made in the context of the mediation were without prejudice, and that the process was confidential between the parties. The parties agreed (*Affidavit of Ms. Michelle Marin* at para 7). From August 11, 2016 to September 14, 2016, after the mediation, the parties each presented two offers bearing the explicit mention "without prejudice". All offers were rejected.

[10] The matter was thus heard by the adjudicator who, as Canada Mortgage conceded the dismissal was unjust, had to decide on the remedy. The parties confirmed that the adjudicator had the authority to order Mr. Fono's reinstatement or grant him damages.

[11] On November 23, 2017, the adjudicator granted Mr. Fono 12 months of notice period and aggravated damages, but decided against reinstating Mr. Fono. On December 21, 2017, Mr. Fono filed an *Application* to challenge the adjudicator's decision whereby seeking eight reliefs.

[12] On April 30th, 2018, Canada Mortgage filed a motion to strike paragraphs 2, 5, 6 and 37(k) of Mr. Fono's *Application*, and a motion to strike paragraphs 168, 169, 170, 186, 187, 188, 189, 190 and 211 and one sentence of paragraph 101(k), of the affidavit Mr. Fono filed in support of his *Application*.

[13] Paragraphs 5 and 6 of the *Application* were struck on consent of parties, and Mr. Fono was given leave to amend in the form he proposed.

[14] Mr. Fono, in his written submissions before Madam Prothonotary Aylen, proposed amendments to paragraph 2 of the *Application* that originally reads:

> 2. Quashing and setting aside the decision of the respondent to terminate the applicant employment with the respondent;

[15] Madam Prothonotary Aylen struck paragraph 2 of the *Application* with leave to amend as Mr. Fono proposed, but she disallowed his proposed amendments 2(c) and (d). The disallowed paragraphs read:

> (c) Order Fono reinstatement to his position as Senior Auditor;
>
> (d) Or alternatively direct CHMC CEO to do everything in his power to reinstate Fono to a different position consistently with his accommodation request and the law.

[16] Madam Prothonotary Aylen agreed with the respondent that the language of paragraphs 2 (c) and (d) was problematic as Mr. Fono continued to seek relief against Canada Mortgage in relation to its decision to terminate his employment. She stressed the fact that before the Court, Mr. Fono does not challenge the decision of Canada Mortgage to terminate his employment, but the decision of the adjudicator (*Transcript of the Motions Hearing Held in Ottawa on September 5, 2018* at 96 [*Motions Hearing*]).

[17] Madam Prothonotary Aylen applied the test suggested by Mr. Fono, and concluded that the impugned paragraphs were "clearly improper as to be bereft of any possibility of success" and had to be struck (*David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 FC 588, at 600 (AD) [*David Bull*]).

[18] Madam Prothonotary Aylen also struck paragraph 37(k) of the *Application* and the impugned paragraphs of the affidavit. She concluded that the offers to settle and particulars of settlement discussions, before, during, and after the mediation were subject to settlement privilege, that the privilege had not been waived, and that no exception was applicable. She further concluded that there was simply no settlement.

III. RELIEF SOUGHT – PARAGRAPHS 2(c) AND (d), 5, AND 6 OF THE *APPLICATION*

[19] Mr. Fono appeals Madam Prothonotary Aylen's decision to disallow paragraphs 2(c) and (d), and, despite his consent, to strike paragraphs 5 and 6 of his *Application*, (*Motions Hearing* at 15). Essentially, Mr. Fono asserts that the Prothonotary erred by striking the impugn paragraphs of the *Application* whereas there was still a debatable issue.

[20] Arguing that, to strike a paragraph, the paragraph has to be "clearly improper as to be bereft of any possibility of success" (*David Bull*), Mr. Fono believes that the reliefs he seeks in the impugned paragraphs are debatable and not clearly bereft of any possibility of success.

[21] Mr. Fono does not challenge the jurisdiction of the Court to dismiss an application in whole or in part, nor does he challenge the applicable test as set out by Madam Prothonotary Aylen to strike an application. He submits that it remains debatable whether an applicant is entitled to obtain relief from this Court directing a certain outcome in judicial review. Reiterating the argument he made before Madam Prothonotary Aylen, he contends that the Court can only strike an application at a preliminary stage, if it is "clearly improper as to be bereft of any possibility of success" (*David Bull*).

[22] In essence, Mr. Fono submits that this Court has the authority to direct a certain outcome instead of returning the file for reconsideration, and he refers to *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55; *D'Errico v Canada (Attorney General*), 2014 FCA 95; *Giguère v Chambre des notaires du Québec*, 2004 SCC 1. Mr. Fono adds that the application judge is entitled to make the decision that should have been made and relies on the decisions in *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Groia v Law Society of Upper Canada*, 2018 SCC 27; *Carroll v Canada (Attorney General)*, 2015 FC 287; *Fisher-Tennant v Canada (Citizenship and Immigration)*, 2018 FC 151.

[23] After the hearing of this appeal, Mr. Fono submitted the Federal Court of Appeal's recent decision in *Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 [*Tennant*] and

representations to support the proposition that the Federal Court has the authority, exceptionally, to substitute its views for that of the administrative decision-maker on a judicial review. Mr. Fono also filed a sur-reply, which the Court had not authorized, whereby raising no arguments that would impact my reasons in any event. Furthermore, this appeal and said sur-reply is not the proper vehicle for Mr. Fono to seek an amendment to his *Application*, and the Court will thus not consider it.

[24] Canada Mortgage submits that Mr. Fono, in the proposed paragraphs 2(c) and (d), is, in fact, asking the Court to overturn the decision to terminate his employment, rather than seeking relief against the adjudicator's decision. It argues that the Court has two options available to it, neither of which allows it to direct Canada Mortgage to reinstate Mr. Fono. It contends that *Groia v Law Society of Upper Canada*, 2018 SCC 27 is an illustration of a directed verdict in that the refusal to remit the matter back to the decision-maker amounts to an order dismissing whatever proceeding was before that decision-maker. It adds that *D'Errico v Canada (Attorney General)*, 2014 FCA 95 is an example of a second type of directed verdict, where the Court quashes and remits with directions as to the outcome. It submits that, either way, a reviewing Court does not have to the authority to bypass an administrative procedure altogether to substitute its own remedy for that of the administrative decision maker.

[25] In reply to Mr. Fono after the hearing, Canada Mortgage submits that *Tennant* is inapplicable because Canada Mortgage is not a "federal board, commission or other tribunal". It adds that *Tennant* is a case in which the relief is directed against the Minister of Citizenship and Immigration, whereas Canada Mortgage is a private entity established pursuant to the *Canada*

Mortgage and Housing Corporation Act, RSC 1985, c C-7. Additionally, Canada Mortgage submits that a direct substitution is available to dismiss a claim, but to not to allow a claim or order some specific positive remedy.

[26] Regarding paragraphs 5 and 6 of the *Application*, Canada Mortgage submits that Mr. Fono should not be permitted to appeal something he conceded before the Prothonotary. Additionally, it adds that damages are not available in an application for judicial review and refers to *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 at para 26, and *Al-Mhamad v Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45 at paras 3-4, which Mr. Fono contests by citing *Canada v Oshkosh Defense Canada Inc.*, 2018 FCA 102 at paras 34-36.

[27] Both parties agree that the applicable test for the review of discretionary orders of motion judges is that of correctness for questions solely of law, and that of a palpable and overriding error for questions of facts, or for mixed questions.

[28] Madam Prothonotary Aylen's application of the test to strike paragraphs of the *Application* is a question of mixed fact and law reviewable only if a palpable and overriding error has been demonstrated (*Hospira Healthcare Corporation v The Kennedy Institute of Rheumatology*, 2016 FCA 215 para 66).

[29] Before me, Mr. Fono must thus establish that Prothonotary Aylen made a palpable and overriding error in concluding that the proposed paragraphs 2(c) and (d) are "clearly improper as to be bereft of any possibility of success" and had to be struck.

[30] The Federal Court of Appeal in *Manitoba v Canada*, 2015 FCA 57 at para 9, citing *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46, pointed out that a "high threshold" has to be met to demonstrate a "palpable and overriding" error: it is a highly deferential standard of review. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[31] The threshold is extremely high for striking an application, as it must be plain and obvious that the application is bereft of any possibility of success (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250).

[32] In this case, Mr Fono has failed to establish that that Madam Prothonotary Aylen erred in deciding to struck paragraph 2 and disallowing the proposed paragraphs 2(c) and (d). The Court needs not address the issue as to whether Canada Mortgage is a "federal board, commission or other tribunal" because this argument was not raised before the Prothonotary, nor is it dispositive of the result. I need not thus consider Mr. Fono's sur-reply on this aspect, which I had not permitted in any event.

[33] It has been acknowledged that Courts have the jurisdiction to exceptionally direct certain outcomes in a judicial review of an administrative decision. *Groia v Law Society of Upper Canada*, 2018 SCC 27 is a case in which the Supreme Court of Canada quashed an administrative decision without remitting. In *Tennant*, Laskin J.A. enumerated three ways in which the Federal Court can direct certain outcomes: through an indirect substitution (at paras 71-72), through a declaratory judgment (at para 75), and through a direct substitution (at para 79). Mr. Fono, by demanding a reinstatement order or action by Canada Mortgage CEO in his *Application*, is in effect demanding the Federal Court to directly substitute the opinion of the adjudicator with that of its own.

[34] Despite acknowledging that Courts have the jurisdiction to make the substitution, Laskin J.A. stated that this can only be done in exceptional circumstances. Direct substitution is available when there is "only one reasonable outcome, so that returning the matter to the administrative decision-maker would be pointless" (*Tennant* at para 82). Near J.A., in his dissenting reasons, agreed with the majority for the test as to whether a substitution can be made (*Tennant* at para 96).

[35] In the case at bar, Mr. Fono makes no allegations in his *Application* that reinstatement is the only reasonable remedy, nor did he make this argument before the Prothonotary. To the contrary, he rather implicitly acknowledges that reinstatement could be found to be not suitable (*Application* at paras 37(a)-(c)). His arguments center on the fact that the adjudicator's analysis of the suitability of reinstatement is narrow and unfair (*Application* at para 39). The analysis as to whether reinstatement should be ordered being multifactorial and inherently discretionary, Mr.

Fono has not given reasons for which the adjudicator or another adjudicator should not have a second chance reweighting the factors after correcting the alleged mistakes that Mr. Fono points out in his *Application*. Additionally, Mr. Fono never stated why it would be pointless to remit the file back to the adjudicator, especially considering that the adjudicator remain seized on the matter of costs of the adjudication.

[36] There is no demonstration that Madam Prothonotary Aylen erred in concluding that the relief sought had no possibility of success based on the specific allegations made by Mr. Fono.

[37] Given the parties' consent and the absence of any allegations suggesting that the consent was not valid, Madam Prothonotary Aylen did not err in striking paragraphs 5 and 6 of the *Application* with leave to amend as she ordered. The Court need not analyze any further whether damages are available on a judicial review.

IV. SETTLEMENT PRIVILEGE

[38] Mr. Fono submits that Madam Prothonotary Aylen erred in striking paragraph 37(k) of the *Application* and the impugned paragraphs of his affidavit, all relating to the settlement discussions between the parties, while the issues as to whether these paragraphs are subject to settlement privilege and exceptions to settlement privilege were still debatable. He believes that the appropriate procedure was to leave the affidavit for evaluation by the judge who hears the application on the merit as in *Armstrong v Canada (Attorney General)*, 2005 FC 1013.

[39] Mr. Fono submits that (1) Canada Mortgage is not entitled to claim settlement privilege over the communication; (2) it has waived settlement privilege; (3) the decision to allow or to exclude the communication should have been left to the application judge because of exceptions to settlement privilege.

[40] Mr. Fono gives seven reasons for which an exception to settlement privilege applied. His main arguments are that the parties reached a partial settlement on main issues and that only non-essentials matter remained to be decided by the adjudicators; that Canada Mortgage disclosed the communications as part of their costs submissions; and that the content of the communications is necessary to demonstrate potential bias apprehension on the part of the adjudicator.

[41] Specifically regarding the reinstatement letter, Mr. Fono argues that it is not a settlement offer, because Canada Mortgage made no compromise, and would, therefore, not be subject to the privilege.

[42] Arguing that a settlement was reached, Mr. Fono submits that parties have agreed on all substantial aspects of a settlement. He adds that terms not explicitly agreed upon could be implied.

[43] Canada Mortgage responds first that Madam Prothonotary Aylen did not act in an abusive or unreasonable manner by striking the portions of the affidavit and notice at a preliminary stage. It responds as well that Madam Prothonotary Aylen did not err in law or make a palpable and overriding error in fact in assessing the scope of settlement privilege.

[44] For Canada Mortgage, the parties never agreed on the amount of damages, which would be an essential term that has to be agreed upon for a settlement. Additionally, Canada Mortgage argues that a judicial review is not an enforcement action and that the evidence of a settlement is not necessary.

[45] Regarding the bias argument raised by Mr. Fono against the adjudicator, Canada Mortgage responds that this was not raised in a timely manner by bringing a motion before the adjudicator to recuse herself. Canada Mortgage submits that, similarly to Madam Prothonotary Aylen's conclusion on the matter (*Motions Hearing* at 103), the failure to raise it constitutes a waiver. Additionally, it submits that the offers are not necessary evidence to prove bias.

[46] Mr. Fono has not established that Madam Prothonotary Aylen erred, and the Court agrees with the respondent that she did not err. She properly outlined the relevant principles as well as the three conditions that must be met for settlement privilege to apply. She rightfully concluded that settlement privilege does apply. She carefully analyzed the exceptions to settlement privilege, balancing the public interest in encouraging settlements and competing public interests, such as that in seeking the truth and that in disposing correctly of the litigation.

[47] Her conclusion that the parties have reached neither a full nor a partial settlement is supported by the evidence submitted in this case. Had the negotiations between the parties been concluded by a settlement, the adjudicator would not have had to decide on the remedies or would have had a much narrower scope of adjudication. The quantum of damages was an essential consideration; the Court finds no error in this assertion.

[48] Mr. Fono has not convinced the Court that the Prothonotary erred in law, nor that she erred in applying it to the facts at hand. The evidence supports her conclusion that the settlement privilege applies to the communications and there is no demonstration that she erred in striking the impugned paragraphs of the affidavit and of the *Application*.

[49] The Court is also satisfied Madam Prothonotary Aylen did not err in her conclusions regarding the bias argument directed at the adjudicator as Mr. Fono failed to raise it at the earliest opportunity.

V. SEALING ORDER

[50] Canada Mortgage seeks an order that the appeal records be sealed, with all references subject to settlement privilege to be redacted from the public versions of the records that both parties shall file pursuant to the order.

[51] Mr. Fono takes the position that no sealing order should be made, and he also appeals the September 5, 2018 sealing order made by Madam Prothonotary Aylen on the basis that no one sought the order, and that he did not have time to prepare arguments on the matter.

[52] In her September 5, 2018 decision, Madam Prothonotary Aylen ordered a temporary sealing of the records of both motions and gave the parties until September 26, 2018 to file public versions of their respective motions records. She ordered that new public versions filed contain no matters covered by settlement privilege.

[53] On November 15, 2018, Mr. Fono, with consent of Canada Mortgage, was also granted an order protecting and maintaining the confidentiality of medical information. Both parties subsequently identified documents filed in court that contain medical information, and filed public versions.

[54] Canada Mortgage submits that it sought the sealing order during the hearing before the Prothonotary (*Motions Hearing* at 35), and that Mr. Fono was not prejudiced by the order.

[55] The record shows that Canada Mortgage sought the order during the hearing, that Madam Prothonotary Aylen gave Mr. Fono the opportunity to comment, but that he failed to make a comment that was on point (*Motions Hearing* at 36). There was no allegation by Mr. Fono that he has been prejudiced.

[56] There has been no demonstration of an error on the part of Madam Prothonotary Aylen.

[57] The sealing order for appeal records sought by Canada Mortgage will be granted. Appeal records will be ordered to be sealed, and parties will be ordered to file public versions of their appeal record, with all references regarding settlement discussions redacted within 30 days of this judgment.

VI. COSTS

[58] Mr. Fono seeks costs of the motions before Madam Prothonotary Aylen, and of the appeal. Alternatively, he submits that no costs should be, nor should have been ordered against

him because (1) it is the general practice of the Court to allow the application judge to set the overall costs, and (2) the *Application* has a strong public interest component. If costs are to be awarded against him, Mr. Fono argues that they should be at the lowest end of column III of Tariff B in the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[59] Canada Mortgage asks the Court to maintain Madam Prothonotary Aylen's order regarding costs and seeks costs on appeal.

[60] The Court agrees with Canada Mortgage in that (1) being inherently discretionary, costs should only be set aside if there is an error in principle or if the award is plainly wrong; (2) paragraph 401(1) of the *Rules* gives a motion judge the discretion to award costs; and (3) this application does not qualify as a public interest proceeding because the applicant has a significant personal and pecuniary interest in the outcome of the case, which is contrary to the requirement set in *Arctos Holding Inc. v Canada (Attorney General)*, 2018 FC 365 at para 34. Madam Prothonotary Aylen's order regarding costs is thus upheld.

[61] Costs in this appeal will be granted in favour of Canada Mortgage.

JUDGMENT in T-2060-17

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed;
2. Appeal records of the parties are ordered to be sealed;
3. Parties are ordered to file public versions of their appeal records within 30 days of this judgment;
4. Costs are awarded in favour of Canada Mortgage.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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