Federal Court  Cour fédérale

Date: 20210309

Docket: T-471-20

Citation: 2021 FC 213

[REVISED ENGLISH TRANSLATION]

Ottawa, Ontario, March 9, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CECILIA CONSTANTINESCU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This is an appeal from an order issued by a prothonotary on February 12, 2021, striking the applicant's application for judicial review of an interlocutory decision of the Canadian Human Rights Tribunal.

[2] For the reasons that follow, the appeal is dismissed.

II. **Background**

[3] The applicant filed a complaint with the Canadian Human Rights Commission (Commission) against the Correctional Service of Canada (CSC) in October 2015. The Commission referred the complaint to the Canadian Human Rights Tribunal (Tribunal) on May 31, 2017.

[4] Since July 2017, the file has remained at the disclosure stage, which has been undermined by numerous motions from the applicant, some seeking the disclosure of documents, others seeking a stay of proceedings or an expansion of the complaint, with the effect that several interlocutory decisions have already been rendered by the Member.

[5] Since the complaint was filed, the applicant has commenced eight proceedings in the Federal Court, and two in the Federal Court of Appeal. The applicant's applications for judicial review in dockets T-976-18, T-1571-18 and T-102-19 were struck on the basis that they were premature and that the applicant had failed to establish exceptional circumstances warranting the Court's intervention.

[6] On January 17, 2020, the applicant asked the Member to recuse himself on the basis of a reasonable apprehension of bias against her. This apprehension of bias arose from case law research that the applicant had conducted.

[7] On July 27, 2020, the respondent brought an application to strike the notice of application for judicial review on the grounds that the application was premature. On December 10, 2020, although the respondent's motion was not yet settled, the Court scheduled a hearing for the application for judicial review. The respondent notified the Court on January 20, 2021.

[8] On January 26, 2021, the Tribunal Member decided that he had an obligation, as the decision maker in quasi-judicial proceedings, to re-examine the issue of abuse of process in the case, which could potentially result in the dismissal of the complaint and the closure of the file.

[9] On February 12, 2021, Madam Prothonotary Molgat granted the motion to strike and ordered that the notice of application for judicial review be struck without leave to amend on the basis that the application for judicial review was premature.

[10] The applicant is now seeking to have the order of February 12, 2021, set aside. The parties were heard by videoconference on Wednesday, March 3. The applicant is representing herself, without the assistance of counsel.

III. **Issue**

[11] In this case, the issue before this Court is whether Prothonotary Molgat erred in ordering that the notice of application for judicial review be struck.

IV. **Standard of review**

[12] As stated by the Federal Court of Appeal in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, the standard of review applicable to discretionary orders of prothonotaries is correctness for questions of law and palpable and overriding error for findings of fact and questions of mixed fact and law absent an extricable question of law: *Housen v Nikolaisen*, 2002 SCC 33, at paras 8, 10, 36 and 83 [*Housen*].

[13] As confirmed by the Federal Court of Appeal in *Rodney Brass v Papequash*, 2019 FCA 245, "palpable and overriding error . . . is a high and difficult standard to meet". This was explained by the Court in *Canada v South Yukon Forest Corporation*, 2012 FCA 165, at para 46 [*South Yukon Forest Corporation*]:

> "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.

V. **Analysis**

[14] The applicant challenges the denial of her request for a hearing on the grounds that the prothonotary erred in stating that [TRANSLATION] "asserting her rights and presenting her arguments" was not a justification for having a hearing scheduled when the Judicial Administrator had already scheduled the hearing in accordance with the instructions of the Chief Justice.

[15] It appears that when the file was referred to the office of the Chief Justice for the scheduling of a date for the hearing, the Registry was unaware of the fact that on July 27, 2020,

the respondent had brought a motion to strike the notice of application for judicial review, which had yet to be decided. It was appropriate for the respondent to inform the Court of this on January 20, 2021. This was an administrative error that did not entitle the applicant to a hearing.

[16] Absent exceptional circumstances, the Court should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted. The threshold for exceptionality is high (see *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 31–33; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35–36; *Black v Canada (Attorney General)*, 2013 FCA 201 at paras 7–10 [*Black*]; *Dugré v Canada (Attorney General)*, 2021 FCA 8 at paras 37–38 [*Dugré*]).

[17] In this case, the applicant has not raised any exceptional circumstances warranting the intervention of this Court in the Tribunal's proceedings; therefore striking the motion at the preliminary stage was correct. Allegations of bias against a Tribunal member do not constitute exceptional circumstances: *Black* at paras 9–10 and *Air Canada v Lorenz*, [2000] 1 FC 494.

[18] Contrary to the applicant's claims, the recusal motions are not different in nature from interlocutory motions. They are interlocutory motions: *Francis v Canada (Citizenship and Immigration)*, 2012 FC 1141 at para 23.

[19] The Court may strike a motion before hearing a case on the merits. Not only is it open to the Court to strike a motion before hearing a case on the merits, it may do so of its own motion:

Canada (Border Services Agency) v CB Powell Limited, 2010 FCA 61 at paras 31–33; *Dugré* at para 38.

[20] The Court of Appeal has made it clear on several occasions that dismissing an appeal as premature does not violate the accused's right to challenge any interlocutory decision rendered by the Tribunal once the administrative process has been completed. The same is true for applications for judicial review.

[21] The applicant is correct to claim that the prothonotary committed an error of fact in stating that a decision was pending for six motions for disclosure filed by the applicant in the complaint file when the Member had rendered a decision settling the six motions on March 6, 2020. However, this error is not palpable and overriding, as defined in *South Yukon Forest Corporation*, cited above. It is a minor error that in no way affects the prothonotary's decision.

[22] Also, the fact that the prothonotary noted that the disclosure was ongoing is not an error simply because the Tribunal is currently considering a dismissal of the complaint for abuse of process. However, by addressing her application to this court, the applicant appears to be attempting to short-circuit the consequences she would face if the Member were to hold, on the basis of her deliberate conduct, that she had committed an abuse of process in the context of her complaint proceedings.

VI. **Conclusion**

[23] The applicant has not established a palpable and overriding error committed by the prothonotary or an error of law. For the reasons set out above, the motion is dismissed.

[24] This appeal is one of the ten applications for judicial review or appeals filed by the applicant with the Federal Court or Federal Court of Appeal since 2018. All have required the use of public funds and judicial resources and have detracted from the handling of the applicant's complaint.

[25] The appeal from the prothonotary's decision in this case could not possibly succeed. In the circumstances, the respondent's request for costs in the amount of $1,500 is reasonable.

ORDER IN T-471-20

THIS COURT ORDERS that

1. this application be dismissed;

2. costs be awarded to the respondent in the amount of $1,500, payable by the applicant.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-471-20
STYLE OF CAUSE:	CECELIA CONSTANTINESCU v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 3, 2021
ORDER AND REASONS BY:	MOSLEY J.
DATED:	MARCH 9, 2021

APPEARANCES:

Cecilia Constantinescu	FOR THE APPLICANT (on her own behalf)
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