Federal Court Cour fédérale

Date: 20220411

Docket: T-1181-19

Citation: 2022 FC 440

Ottawa, Ontario, April 11, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

JEAN-PHILIPPE LADOUCEUR

Applicant

and

BANQUE DE MONTREAL

Respondents

JUDGMENT AND REASONS

[1] The Applicant filed a Notice of Motion and Motion Record seeking reconsideration of an Order of Prothonotary Steele dated May 3, 2021. Based on the wording of the request, Prothonotary Steele indicated that “the motion bears the hallmarks of an appeal of my order” and thus directed that the matter be referred to a Judge of this Court for consideration.

[2] This is consistent with the Applicant’s position set out in his Reply submissions, noting that the Respondent’s submissions clarified that the scope of reconsideration under Rule 397(1)

of the *Federal Courts Rules*, SOR/98-106 [*Rules*] "appears to be quite restrictive" and then stating:

> Consequently, the Applicant respectfully clarifies that Rule 51 regarding the appeal of a discretionary order rendered by a [Prothonotary] also applies in this motion record… [and] it is important to highlight that the Applicant made relevant reference to the standard of review determined by the Federal Court for the appeal of a discretionary order rendered by a [Prothonotary].

[3] The Court therefore treated this matter as an appeal of the Prothonotary's Order pursuant to Rule 51 of the Rules.

I. Background

[4] On July 17, 2019, the Applicant filed a Notice of Application seeking judicial review of the decision of an Adjudicator dismissing his complaint of unjust dismissal. The Applicant represents himself in this matter.

[5] It is not necessary to trace in detail all of the procedural steps in this matter because many of them are not pertinent to the disposition of this appeal. At this stage, it is sufficient to mention that the Applicant requested material from the Adjudicator under Rule 317, which pertains to the filing of a Certified Tribunal Record by the decision making body whose decision is under judicial review. The Adjudicator had recorded the arbitration hearing proceedings on his personal device, and objected to the request for the recordings, claiming that they should fall within the deliberative secrecy exception. This objection was dismissed, and the Adjudicator then filed some of the recordings, but not all of them. This was acknowledged, and the rest of the recordings were then filed.

[6] The Applicant has complained that he did not receive all of the recordings, and later he indicated that he could not gain access to some of the recordings because the links did not work. The Applicant eventually obtained access to all of the recordings of the arbitration hearing, although he continues to raise concerns about the documentation. This is discussed in more detail below.

[7] On February 23, 2021, the Court issued a Notice of Status Review, indicating that more than 180 days had elapsed since the issuance of the Notice of Application and no Requisition for Hearing had been filed. The Notice of Status Review states, in part:

> Accordingly, the Applicant is required to serve and file, within 15 days of this notice, representations stating the reasons why the proceeding should not be dismissed for delay. The representations shall include a justification for the delay and a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner.

[8] The Applicant and Respondent both filed submissions in response to the Notice, and Prothonotary Steele considered these in her Order dated May 3, 2021.

[9] In that Order, Prothonotary Steele set out the tests that apply to status review decisions, and then discussed the Applicant’s justification for the delay, finding it to be inadequate. She noted that the Applicant had sought to justify the delay by pointing the Adjudicator’s failure to file the missing recordings of the hearing, but she found that this was not a relevant consideration on the status review. She also noted that the Applicant had failed to take steps to address this alleged failure, and that in light of the fact that he had access to all of the recordings since at least August 3, 2020, there was no reason he could not have served his own affidavit and documentary

evidence as required by Rule 306. This part of the Prothonotary's reasoning is discussed in more detail below.

[10] In addition, Prothonotary Steele noted that the Applicant had failed to provide a proposed schedule for moving the matter forward in an expeditious manner, as required by the Notice of Status Review. In light of all of the circumstances, Prothonotary Steele indicated that "the Court is not convinced that this proceeding should continue." She therefore dismissed the application, with costs to the Respondent.

[11] The Applicant is now appealing that Order.

II. Issues and Standard of Review

[12] The only issue is whether to grant the Applicant's appeal from the Order of Prothonotary Steele.

[13] The Applicant raised a number of arguments in support of his appeal, and these are considered below.

[14] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], the Federal Court of Appeal stated that the standard of review that applies to an appeal of an order by a Prothonotary is that set out in *Housen v Nikolaisen*, 2002 SCC 33. As explained at paragraph 64 of *Hospira*, that standard requires that discretionary orders of Prothonotaries be interfered with only when such decisions are incorrect in law or based on a palpable and overriding error with respect to the facts.

[15] Palpable and overriding error is a difficult standard to meet. A palpable error has been described as “obvious” and an overriding error is one that affects the outcome of the case. As set out in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 46, “it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.”

III. Analysis

[16] The core of the Applicant’s argument is that the records in the Court file demonstrate that he has been diligently seeking to obtain the material in the possession of the tribunal under Rule 317, but the Adjudicator has failed to comply. He disputes the Prothonotary’s statement that his sole justification for the delay rested on the Adjudicator’s failure to file the three missing recordings with the Court in a timely manner. The Applicant submits that he provided many justifications for the delay.

[17] The Applicant also argues that there is a distinction between a Defendant who did not meet the timelines and the failure of the Tribunal to meet its obligation to file the record under Rule 317, because the record is needed in order for the Court to consider the judicial review. He says that the Adjudicator’s materials were necessary for him to take further procedural steps, and without that material, he could not independently advance his case.

[18] The Applicant argues that requiring him to take further steps before the Adjudicator filed the complete record was inconsistent with the procedural Order dated January 28, 2020 and the amendment to that Order dated March 24, 2020.

[19] In answer to the Prothonotary's finding that he had access to all of the recordings no later than August 3, 2020 and could thus have filed his own affidavit and documents, the Applicant submits that he had to review almost 400 pages of documentary evidence and almost 35 hours of audio recordings in order to ensure the accuracy of the material submitted by the Adjudicator. He contends that the material submitted contains many irregularities but he has been unable to address these issues.

[20] The Applicant argues that the Court should take into account that he represents himself, and that he must therefore rely on the advice and guidance provided by the Registry staff. He says the Registry advised him that his deadline to file further material only began once the Adjudicator filed the tribunal record. He refers to communication with Registry staff about the obstacles the Court would face in dealing with an inadequate tribunal record, and that he was advised that it would be better to delay bringing a formal motion to seek compliance by the Adjudicator. He also says that he was never warned that his case might fall under status review after 180 days of file inactivity or that the burden ultimately rested with him to justify why his case should not be dismissed.

[21] The Applicant submits that he has "many valid reasons justifying the current delay" and he states that he is willing to submit a concrete timetable for the completion of the steps needed to get the case to a hearing. He says that he has never demonstrated any opposition to formulating a timetable, but he did not think he should propose one because "he did not want to appear as the party dictating the timelines for subsequent steps in this matter." The Applicant sets out a proposed timetable in his motion material on this appeal.

[22] Finally, the Applicant contends that it "would be in the interest of the due administration of justice that this proceeding should continue" and that dismissing it at this stage would "constitute a major injustice since it would effectively prevent the Applicant from being able to be heard… with regards to the final issue of this current proceeding."

[23] He also argues that dismissing his claim now would serve as an incentive to tribunals to fail to meet their obligations to file the tribunal record under Rule 317, noting that the Adjudicator demonstrated what he describes as "a repetitive indifference to comply" with the Rules and a "repetitive lack of cooperation to fulfil basic obligations" and the "repetitive reluctance to provide basic accountability and transparency" with regards to the arbitration file.

[24] The Applicant therefore requested that the appeal be granted, the Order of Prothonotary Steele be reversed, and also that the Court ensure that the Adjudicator comply with the order to file the tribunal record.

[25] Having reviewed the submissions of the parties, I am not persuaded that the Prothonotary made any palpable and overriding error in reaching the decision to dismiss the claim.

[26] First, the Prothonotary applied the correct law to the consideration of the responses to the notice of status review. The test set out in the jurisprudence – and the test applied by the Prothonotary here - requires a consideration of two main questions:

i. what are the reasons why the case has not moved forward faster and do they justify the delay that has occurred?; and

ii. what steps is the [claimant] now proposing to move the matter forward? (see Baroud v Canada, [1998] FCJ No 1729 (QL),1998 CanLII 8819 (FC); Canada v Stoney Band, 2005 FCA 15 at para 34; Soderstrom v Canada (Attorney General), 2011 FC 575 [Soderstrom] at para 14).

[27] Second, the Prothonotary considered the Applicant's justifications but found them to be wanting. The arguments of the Applicant, both in response to the Notice of Status Review and on this appeal, revolve around his inability to move his case forward because of the Adjudicator's failure to provide the entire certified tribunal record as required by Rule 317 and by the procedural Order dated January 28, 2020 and amended March 4, 2020. Prothonotary Steele found these submissions to be not persuasive, and in doing so, she made no palpable and overriding error.

[28] The record shows that there was a delay in obtaining the full tribunal record, and the Applicant claimed that he could not get access to the recordings of some parts of the hearing because the links that had been provided did not work. The record also shows, however, that the Adjudicator sent new copies once the problem was pointed out. The record also contains an email from the Applicant dated August 3, 2020 in which he acknowledged receipt of the missing recordings and stated [TRANSLATION] "the Applicant confirms that the electronic links contained in the email of July 30, 2020 sent by [the Arbitrator] are working correctly and finally allow the Claimant to access the audio recordings of the 3 days of hearing concerned."

[29] In light of this, the Prothonotary's finding that the Applicant could have filed his own affidavits and documents after August 3, 2020 is unassailable. The Applicant's argument that he

had to review a great deal of material and listen to many hours of recordings of the hearing does not excuse his delay in advancing his case, much less demonstrate that the Prothonotary made a palpable and overriding error.

[30] The backdrop to the Notice of Status Review is the requirement set out in section 18.4(1) of the *Federal Courts Act*, RSC 1985, c F-7, that applications for judicial review "shall be heard and determined without delay and in a summary way." That is why Rule 380(2) provides for the issuance of a Notice of Status Review after 180 days of inactivity on a file. The Notice issued in this case specified precisely what the Applicant was required to do in order to show why his case should not be dismissed, and the Prothonotary's finding that he failed to do so is well supported in the record.

[31] The Applicant says that he relied on the advice of Registry staff and that he was never warned that his case might be dismissed if he did not justify the delay. This is no answer. First, the Applicant acknowledges that he has received assistance from Registry staff, who have explained the procedures of the Court to him. Second, he represents himself in this matter, and he cannot shift the responsibility for his failure to advance his case to Registry staff (*Soderstrom* at para 26 and the cases cited therein). Third, the Applicant received the Notice of Status Review, the wording of which makes it perfectly clear that he was responsible to provide a justification for the delay and to set out a timetable for moving the matter forward in an expeditious manner. I am not persuaded that the Applicant's arguments support a finding that the Prothonotary made a palpable and overriding error in failing to excuse the Applicant's delay in advancing his case because he was not familiar with the Court's procedures.

[32] In *Soderstrom*, the Chief Justice noted that the Federal Court's website provides a significant amount of information to self-represented parties on how to comply with Court procedures, and since that decision was issued there have been additions to the Court's website that provide even more assistance to parties who represent themselves. This is a relevant consideration, as is the explanation on the website of what Registry Officers can and cannot do for parties, in particular that they are not to provide legal advice to parties (see *Cotirta v Missinnipi Airways*, 2012 FC 1262 at para 15).

[33] The dismissal of a claim as a result of a Notice of Status Review is a significant decision and it should only be taken if no other remedy will suffice, based on the history of the matter and the representations of the parties in answer to the Notice. The "focus should be on the overall interests of justice in the case" (*Roots v HMCS Annapolis (Ship)*, 2015 FC 1339 at para 28). Having reviewed the Prothonotary's Order in light of the representations before her and the record on the appeal, I am satisfied that the Order reflects this approach.

[34] After a careful review of the Applicant's arguments, I am not persuaded that he has demonstrated any palpable and overriding error by the Prothonotary in the Order under appeal.

[35] I therefore dismiss the Applicant's appeal, with costs to the Respondent. In the circumstances of this case, in exercise of my discretion under Rule 400, I would award lump sum costs in the amount of $500 to the Respondent.

ORDER in T-1181-19

THIS COURT'S ORDER is that:

1. The Applicant's appeal of the Order of Prothonotary Steele dated May 3, 2021 is dismissed.

2. The Applicant shall pay lump sum costs to the Respondent in the amount of $500.

"William F. Pentney"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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