Federal Court  Cour fédérale

Date: 20221026

Docket: T-1104-22

Citation: 2022 FC 1466

Toronto, Ontario, October 26, 2022

PRESENT: Associate Judge Trent Horne

BETWEEN:

JOHN MCLAUGHLIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The respondent moves to strike this application for judicial review.

[2] The applicant was formerly employed by the Department of Justice. He resigned in 2008, and entered into a settlement agreement. As part of the settlement, he was paid a lump sum amount; the value of his pension was also transferred to him.

[3] For the purposes of his pension valuation, the lump sum payment was characterized as an *ex gratia* payment. The applicant says this is wrong, and that the payment was eligible to be included as part of his pension calculation; had the payment been included in his pension calculation, the amount would have been higher. Unable to reach an agreement with the government, the applicant filed a lawsuit in the Ontario Superior Court of Justice for money damages against the Department of Justice in 2015. That litigation is ongoing.

[4] In April 2022, the applicant wrote to the relevant Minister and demanded a re-evaluation and recalculation of his pension entitlement.

[5] By letter delivered on or about May 12, 2022, the Acting Assistant Deputy Minister requested that correspondence related to the matter be forwarded to a lawyer at the Department of Justice. No position was taken on the substance of the request. This letter is the subject of the application for judicial review.

[6] The May 12, 2022 letter is not a "decision" or "matter" as those terms are used in section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The respondent has met the high burden of demonstrating that the application should be struck on a preliminary motion.

II. Background

[7] The applicant was employed by the Department of Justice ("DOJ") from 1991 to his resignation on October 23, 2008.

[8] As part of a settlement agreement with the DOJ, the applicant received a lump-sum payment of $289,880.00. He also elected to receive the transfer value of his pension under the

Public Service Superannuation Act, RSC 1985, c P-36 ("PSSA"). "Transfer value" is defined in section 10 of the PSSA as "a lump sum amount, representing the value of the contributor's pension benefits, as determined in accordance with the regulations." The transfer value was paid to the applicant in July 2009.

[9] The applicant asserts that, in June 2015, he engaged in an analysis of records received under a *Privacy Act*, RSC, 1985 c P-21 request, and learned that his pension valuation did not include any part of the $289,880.00 lump sum payment. Had that payment been included in the calculation, the applicant's pension valuation, and therefore transfer value, would have been higher.

[10] The applicant wrote to the Minister of Public Works and Government Services Canada on June 14, 2015 and requested that the Minister exercise her discretion to recalculate the pension transfer value and pay the additional pension benefits, together with interest. The letter demanded a response by June 25, 2015, failing which legal proceedings would be initiated "in a forum of my choice".

[11] In July 2015, the applicant sued the Attorney General of Canada and an individual employed by the DOJ. The statement of claim requests, among other things, damages of $2.5M for negligent misrepresentation, negligence, breach of fiduciary duty, constructive fraud, unjust enrichment, and breach of statute. That litigation is ongoing.

[12] Through counsel, the applicant sent further correspondence to the Minister of Public Services and Procurement Canada on April 28, 2022. The letter asserts that recently released 2021 "Access to Information" documents confirm that DOJ employees made false and

misleading statements in July 2015 that resulted in the lump sum payment not being included in the pensionable salary calculation. The letter reiterated that, as a consequence of the lump sum payment being categorized as an *ex gratia* payment, and not part of the applicant's pensionable salary, the applicant's PSSA transfer payment was materially undervalued. The letter demanded a re-evaluation and recalculation of the PSSA transfer value, and payment of the differential with interest within 20 business days. Litigation in the Federal Court was threatened if the demands were not met.

[13] A reply was delivered on May 12, 2022 ("the Letter"). It states:

> Dear Mr. Hotz:
>
> This is further to your letter of April 28, 2022, regarding Mr. John McLaughlin's transfer value payment.
>
> I am informed Mr. McLaughlin's concerns are currently before the Ontario Superior Court of Justice further to a claim he filed against the Attorney General of Canada and Marcelle Miller in July of 2015.
>
> As such, you are asked to address all correspondence related to this matter to the Justice Canada litigator, Helen Gray at helen.gray@justice.gc.ca or, in writing, at 50 O'Connor Street, Floor 5, Room 503, Ottawa, Ontario, K1A 0H8.
>
> I hope this information is helpful.

[14] The Letter is the subject of this application for judicial review.

III. Test on a Motion to Strike

[15] The test to strike an application for judicial review is a high one. There must be a "show stopper" or "knockout punch" – an obvious, fatal flaw striking at the root of the Court's power to entertain the application. This is also referred to as the "doomed to fail" standard (*Rahman v*

Public Service Labour Relations Board, 2013 FCA 117 at para 7; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33).

IV. Analysis

A. *The Letter is not a "Matter"*

[16] The applicant argues that the letter constitutes a "matter".

[17] There is a clear tendency in the case law to broaden the scope of judicial review to include broader issues than a narrow conception of "decision or order". While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) of the *Federal Courts Act* RSC 1985, c F-7 ("Act") permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought (*Mikail v Canada (Attorney General)*, 2011 FC 674 at para 35, citing *Krause v Canada*, [1999] 2 FC 476 at page 491 (FCA)).

[18] A continuing course of conduct can be the subject of an application for judicial review.

[19] I begin the analysis in this respect with the notice of application, which does not use the word "matter", or expressly describe the respondent's activities as a continuing course of conduct. Paragraph 1(a) of the notice of application requests "[j]udicial review of the May 12, 2022 decision of the Minister of Public Services and Procurement Canada ("Minister") tacitly denying the Applicants (sic) April 28, 2022 request that the Minister re-calculate and pay

the transfer value pension benefit he was entitled to be paid in full, but was not paid in full, under the administrative provisions of the PSSA."

[20] On a motion to strike, the first step is to gain a realistic appreciation of the essential character of the notice of application by reading it holistically and practically without fastening onto matters of form (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at para 50 ("*JP Morgan*"). Even on a broad reading, the notice of application does not challenge a course of conduct.

[21] The notice of application focuses on four material dates. The first is between October 23, 2008 (the date the applicant resigned from the DOJ) and July 20, 2009 (the date the Minister paid the pension transfer value). It was during this time that the Minister characterized the lump sum settlement payment as *ex gratia*, and not as part of the applicant's pension calculation. That is the heart and essence of the dispute. The second material date is 2015, when the applicant had an exchange with the Minister, and the DOJ refused to adjust or amend its calculations. The third material date is in March 2021, when the applicant alleges to have received further records, and alleges that he "learned of the extent of the DOJ deception" (notice of application para 2(o), emphasis in original). The notice of application (para 2(p)) alleges that the DOJ refused to adjust or amend the *ex gratia* characterization at that time. The fourth material date is the Spring of 2022, when the applicant delivered a demand letter (April 22, 2022) and received the Letter in response (May 12, 2022).

[22] On a broad reading of the notice of application, I cannot conclude that it challenges a "matter" or a continuing course of conduct. The DOJ made a decision on the applicant's pension calculation in 2008/2009 (including the *ex gratia* nature of the settlement payment), and has

maintained a consistent position since. While the applicant has written to the DOJ on more than one occasion to advocate for a different outcome, correspondence that simply shows persistent attempts to reverse a negative decision and a continuing commitment to the original decision by the respondent does not constitute a new decision or a course of conduct (*Francoeur v Canada (Treasury Board)*, 2010 FC 121 at para 13).

[23] In *Canadian Broadcasting Corporation (Radio-canada) v Canada (Attorney General)*, 2016 FC 933, the Canadian Broadcasting Corporation ("CBC") challenged an ongoing refusal of the Court Martial Administrator ("CMA") to provide unredacted copies of court martial decisions. One of the issues to be determined was whether the application was out of time, and whether the CBC was seeking judicial review of a "decision or order" or of a "matter". The Court concluded that a course of conduct was in issue, particularly since CBC was challenging the CMA's continuing refusal to provide unredacted copies of court martial decisions subject to a publication ban. The application for judicial review did not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times. On each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case (para 26). Further, it was clear that the relief sought in the notice of application related to a course of conduct (para 27).

[24] Here, the circumstances are different. The respondent maintains the single position in respect of the applicant's pension valuation it took as early as 2008/2009 (that the payment was an *ex gratia* one, and not part of the applicant's pensionable earnings).

[25] I also note the alternative relief in the notice of application at para 1(g):

> (g) In the alternative, an Order setting aside or quashing the decision of the Minister to exclude the $289,880 lump-sum payment from the Applicant's pension valuation and referring the matter back to the Minister to re-calculate the Applicant's pension valuation in accordance with the Minister's PSSA procedures, policies, and guidelines on what compensation payments are administratively included within the definition of "salary" under section 3 of the PSSA – applicable to all PSSA plan members;

[26] The decision referred to in paragraph 1(g) would have been made in 2008/2009. This reinforces my view of the essential nature of what the notice of application really seeks – judicial review of a pension valuation decision that was made in 2008/2009 and has been maintained since then.

[27] *Save Halkett Bay Marine Park Society v Canada (Environment)*, 2015 FC 302 also involved a question of whether an application for judicial review was out of time, and the applicant's assertions that a course of conduct, not a single decision, was under review. The Chief Justice referred to *Krause v Canada*, [1999] 2 FC 476 ("*Krause*") and *Airth v Canada (Minister of National Revenue)*, 2006 FC 1442 ("*Airth*"), where a distinction was drawn between a "decision or order" to which the 30 day limit described in subsection 18.1(2) of the Act applies and a broader "matter" contemplated by subsection 18.1(1) of the Act, to which that limit does not apply. He concluded that these authorities were distinguishable on the basis that they each concerned a course of conduct on the part of the respondent Minister that extended over a period of time that was broader than the making of a single decision or order (paras 75-76). In *Krause*, the appellants challenged "a series of annual decisions reflective of the ongoing policy or practice of the respondent over time" (at paras 11 and 23). Likewise, in *Airth*, it was evident that

the subject matter of the judicial review application was not just a single decision, but rather a course of conduct that "is replete with matters between the Canada Revenue Agency, the RCMP and the Vancouver Policy, the use to be made of the information demanded, the purposes of the Minister, the alleged breaches of the confidentiality provisions of the *Income Tax Act*, the plans and actions of the federal officials and the breaches of *Charter* rights flowing from this conduct" (at paras 8-9). Applying *Krause* and *Airth* to the matter before him, the Chief Justice concluded that the notice of application was solely directed to the Minister's decision to issue a permit, that the proceeding did not challenge a course of conduct, and that the 30 day limitation period applied (paras 78-81).

[28] I reach the same conclusion here. Again, the notice of application does not, directly or on a broad reading, challenge a course of conduct.

[29] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*JP Morgan* at para 51). This general rule is based on the principle that in a motion to strike, the facts alleged in the notice of application are taken to be true, which generally obviates the need for an affidavit (*JP Morgan* at para 52, citing *Chrysler Canada Inc v Canada*, 2008 FC 727 at para 20; aff'd on appeal, 2008 FC 1049). The Court of Appeal noted that an applicant "must set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued" in a notice of application (*JP Morgan* at para 38; paragraphs 301(d) and 301(e) of the *Federal Courts Rules*).

[30] There are, however, some exceptions to the general rule against admitting affidavits on motions to strike, including "where a document is referred to and incorporated by reference in a notice of application" (*JP Morgan* at para 54; see also *Ghazi v Canada (National Revenue)*,

2019 FC 860 at paras 11–12). In addition, this Court recognizes the admissibility of an affidavit in motions to strike where the moving party has added abuse of process as a supplementary ground. In these circumstances, the moving party may file documents to prove the alleged abuse, and the applicant may file any evidence to refute those allegations (*Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 21). Here, the grounds raised by the respondent on the motion include abuse of process.

[31] In his supplemental affidavit, Mr McLaughlin accuses the respondent of obfuscation. He says that his June 14, 2015 letter to the Minister requests a revocation of his pension option (which is provided for under section 19 of the *Public Service Superannuation Regulations*, CRC, c 1358 ("PSSR")), and that he made email requests in March 2021 for a pension recalculation, which is not provided for under the PSSR.

[32] The supplemental affidavit, like the first, includes argument. The purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18). I have disregarded the portions of Mr McLaughlin's affidavits that are plainly argument. This particularly includes what is presented under the heading "high likelihood of success on the judicial review application" in the first affidavit.

[33] The notice of application refers to revocation of a pension election in one paragraph (2(l)), which refers to events in 2015. The April 28, 2022 demand letter is referred to as a "demand to re-calculate". The notice of application does not, however, expressly distinguish between requests for, and decisions in respect of, revocation and recalculation. To the extent the applicant now argues that one kind of decision was made in 2008/2009 or 2015 (revocation), and

a different kind of decision was requested in 2021 and 2022 (recalculation) that is not clear or apparent from the notice of application.

[34] Any such argument is also unsupported by the documents included in the motion materials, particularly the request made by the applicant in his June 14, 2015 letter to the Minister:

> Accordingly, I formally request, whether pursuant to section is of the Public Service Superannuation Regulations, or at law, that you exercise your discretion to have the transfer value re-calculated, as at the selected valuation date, taking into account the effect of the above referenced pay amounts on both (a) the length of pensionable service, and/or (b) the average pensionable earnings or salary. The resulting additional pension benefit payments, together with interest to date, will be significant. (Emphasis added.)

[35] While section 19 of the PSSR is under the heading "revocation of option-erroneous information", the applicant's June 14, 2015 letter was not limited to remedies under the PSSR – relief was requested under the PSSR "or at law", and expressly requested recalculation, something he now says is not provided for in the PSSR.

[36] The applicant points to an email from a DOJ employee dated September 24, 2015 that states "[t]o date, no position has been taken with respect to your request for a pension transfer value revocation." That email does not have the effect of reading down the applicant's June 14, 2015 request, which broadly requested recalculation "at law", and which was not limited to remedies available under the PSSR.

[37] The applicant also refers to an email from the applicant to the Minister on August 28, 2015 which states that " … I am now seeking the consent of the Minister to "revoke" under the authority of section 19 of the [PSSA]."

[38] Fundamentally, the decision to characterize the settlement payment as *ex gratia* was made in 2008/2009. The applicant could have requested revocation and/or recalculation at least as early as 2015. His June 14, 2015 letter expressly requested recalculation. To the extent he now says that revocation and recalculation are different remedies requiring different venues for separate adjudication, that was or should have been known (and pursued) in 2015.

[39] The applicant also points to emails he sent to the Minister in March 2021 requesting recalculation. On a plain reading of the June 14, 2015 letter, I cannot accept that a request for pension recalculation was made for the first time in 2021 or 2022, or that the Minister/DOJ's continuing commitment to the original pension valuation decision constitutes a course of conduct.

[40] Interpreting the Letter as a course of conduct or "matter" would also be contrary to the jurisprudence referred to below that a courtesy response is not a "decision". To hold otherwise would invite litigants to repeatedly deliver correspondence to a decision-maker in the hopes of provoking any form of response, and then using whatever reply is provided to ground a new application for judicial review framed as challenging a course of conduct. A party cannot accomplish indirectly what it cannot do directly.

[41] Subsection 18.1(2) of the Act provides that an application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated.

[42] The 30-day time limit for filing an application for judicial review is not arbitrary; it exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense (*Canada v Berhad*, 2005 FCA 267 at para 60). Permitting parties to transform courtesy responses into courses of conduct would significantly undermine this important principle. Here, the applicant has known about and disputed the respondent's characterization of the settlement payment as *ex gratia* since at least 2015, and has been (or should have been) alert to his ability to request revocation and/or recalculation of his pension option since then.

[43] The applicant's written argument seizes on an email from the DOJ which states that "[t]he matter appears to center around whether the ex gratia payment should be pensionable …" (emphasis added). I give this no weight at all. The word "matter" as used in the email is in an entirely different context, and constitutes no form of admission that the application for judicial review is in respect of an ongoing course of conduct.

[44] The applicant argues that these events are a "poster child" of flawed and unreasonable administrative decision-making process and outcome, that the application must be he heard on the merits or *Canada v Vavilov*, 2019 SCC 65 is of no practical effect, and that there will be no incentive for the Minister to ever comply or modify its behaviour. I disagree. The applicant had an opportunity to challenge the pension valuation decision by way of judicial review at the time it was made, and did not. To the extent his belief that the pension valuation was miscalculated arose upon the later receipt of documents in 2015 or 2021, he did not commence an application for judicial review seeking recalculation at that time, and seek a retroactive extension of time.

The applicant did pursue his claim in the Ontario Superior Court of Justice, and that proceeding is ongoing. The actions and inactions of the DOJ will be subjected to scrutiny in that Court. To the extent there are differences in causes of action or remedies that can be pursued in the Ontario Superior Court of Justice and the Federal Court, that does not transform the nature of the proceeding into something it is not – a "matter" or course of conduct.

B. *The Letter is not a "Decision"*

[45] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review. One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects (*Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 28-29).

[46] On a plain reading, the Letter made no form of decision. It did not reflect a conclusion reached after consideration. The Letter is limited to a reference to the ongoing litigation in Ontario, and requests that correspondence on this issue be directed to a Justice Canada litigator. As set out in more detail above, the Letter does not alter the status quo of the dispute between the applicant and the DOJ, particularly in respect of the *ex gratia* characterization of the settlement payment, and the applicant's request for recalculation made in 2015. The Letter does not affect the applicant's legal rights (the applicant's rights were affected by a decision made years before), impose obligations or cause prejudicial effects. To the extent the applicant argues prejudice arising from his pension calculation, that prejudice existed long before the Letter was written. The Letter did not determine any of the applicant's rights, substantive or procedural (*Prince v*

Canada (National Revenue), 2020 FCA 32 at para 21). At best, the Letter can be described as a courtesy response, directing inquiries to someone else.

[47] There is consistent jurisprudence that a "courtesy response" does not create a new decision from which judicial review may be taken. Counsel cannot extend the date of a decision by writing a letter with the intention of provoking a reply. Before there is a new decision, subject to judicial review, there must be a fresh exercise of discretion such as a reconsideration of a prior decision on the basis of new facts (*Landriault v Canada (Attorney General)*, 2016 FC 664 at paras 21-23; *9027-4218 Québec Inc v Canada (National Revenue)*, 2019 FC 785 at para 40).

[48] The applicant's correspondence of April 28, 2022 to the Minister refers to "recently released 2021 Access to Information documents" which "confirm" that DOJ employees falsely stated that an ex *gratia* payment had been made to the applicant in 2009. This correspondence reiterates the applicant's long-held position that the payment made to the applicant in 2009 by the DOJ was not *ex gratia*, but does not advance a request that the Minister/DOJ had not already heard, considered, and responded to. In response, the Letter does not exercise fresh discretion, it merely refers the inquiry to someone else. I do not have information in the record as to whether the applicant's inquiry was in fact sent to the litigator at Justice Canada.

[49] I do not accept the applicant's submission that the Letter is a tacit denial of the applicant's request, and therefore amenable to judicial review. There was a tacit denial by the addressee to engage in direct communication with applicant's counsel, but that does not trigger rights of judicial review where the decision was made long ago, and past assertions and threats are merely reiterated.

[50] I conclude that the Letter did not involve a fresh exercise of discretion, therefore it is not a “decision” as that term is used in subsection 18.1(2) of the Act.

[51] I am therefore satisfied that the respondent has met the high burden to strike the notice of application at a preliminary stage. The notice of application will be struck.

[52] Striking a pleading without leave to amend is a power that must be exercised with caution. If a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani v Canada*, 2017 FC 786 at paras 32-35).

[53] I am not satisfied that the shortcomings in the notice of application can be remedied with better drafting. It is plain and obvious that the Letter is not a “decision” and not a “matter”. It is not subject to judicial review. The notice of application will be struck without leave to amend.

V. Other Issues

[54] Having concluded that the Letter is not a “decision” or “matter”, I need not address the respondent’s argument that the notice of application is an abuse of process which attempts to re-litigate or duplicate the ongoing litigation in Ontario.

VI. Costs

[55] The Court has full discretionary power over the amount and allocation of costs (subrule 400(1)).

[56] As the successful party, the respondent is entitled to its costs.

[57] Costs will be awarded to the respondent, fixed at $800.00. This represents recovery at the middle of Column III for preparation and filing of a contested motion.

JUDGMENT in T-1104-22

THIS COURT'S JUDGMENT is that:

1. The notice of application is struck, without leave to amend.

2. Costs are awarded to the respondent, fixed at $800.00, payable forthwith.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1104-22
STYLE OF CAUSE:	JOHN MCLAUGHLIN v AGC

MOTION CONSDIERED IN WRITING WITHOUT THE PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS:	ASSOCIATE JUDGE TRENT HORNE
DATED:	OCTOBER 26, 2022

WRITTEN REPRESENTATIONS BY:

Glyn Hotz	FOR THE APPLICANT
Aman Owais	FOR THE RESPONDENT

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