Federal Court Cour fédérale

Date: 20230316

Docket: T-1104-22

Citation: 2023 FC 359

Ottawa, Ontario, March 16, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JOHN MCLAUGHLIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, John McLaughlin, brings a motion to set aside the order of Associate Judge Horne ("AJ Horne") dated October 26, 2022 (the "Order"), pursuant to Rule 51 of the *Federal Courts Rules,* SOR/98-106 (the "*Rules*").

[2] The Order granted the Respondent's motion to strike the Applicant's application for judicial review of a letter delivered to the Applicant on or about May 12, 2022 by the Acting Assistant Deputy Minister of Public Services and Procurement Canada (the "Letter"). AJ Horne found that the application should be struck on the basis that the Letter is not a "decision" or "matter" as per section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the "Act").

[3] The Applicant submits that the Order contains a palpable and overriding error in that it mischaracterizes the subject of the application for judicial review. The Applicant further submits that AJ Horne mischaracterized key facts and evidence, sufficient to warrant this Court's intervention.

[4] For the reasons that follow, I find that AJ Horne made no palpable and overriding error in granting the Respondent's motion and striking the application for judicial review. I therefore dismiss this motion with costs.

II. <u>Facts</u>

A. *Relevant Background*

[5] The Applicant was an employee of the Department of Justice ("DOJ") from 1991 to 2008. He reached a settlement agreement with the DOJ in which he received a lump sum payment of $289,880. He also elected to receive a transfer value of his pension under the *Public Service Superannuation Act*, RSC 1985, c P-36, which is a lump sum amount in the value of his

pension benefits, determined in accordance with the regulations. The Applicant received this transfer value in July 2009.

[6] The Applicant claims that upon analysing his records received under a *Privacy Act*, RSC, 1985 c P-21 request, he learned that his pension valuation did not include the $289,880 lump sum amount. He claims that had he received this amount, his pension valuation and, in turn, his transfer value, would have been higher.

[7] On June 14, 2015, the Applicant wrote to the Minister of Public Works and Government Services, requesting a recalculation of his pension transfer value and a payment of additional pension benefits, including interest. In this letter, the Applicant stated that if he did not receive a response by June 25, 2015, he would initiate legal proceedings.

[8] In July 2015, the Applicant filed a lawsuit against the Attorney General of Canada and an employee of the DOJ. This litigation is ongoing.

[9] On April 28, 2022, the Applicant's counsel wrote to the Minister of Public Services and Procurement Canada, on the Applicant's behalf. The letter claimed that recently released "Access to Information" documents confirmed that DOJ employees made false and misleading statements in July 2015, resulting in the lump sum payment not being included in the calculation of the Applicant's pensionable salary. The letter stated that the lump sum payment was categorized as an *ex gratia* payment, which is a discretionary payment made without legal obligation, and the Applicant's transfer value was therefore materially undervalued. The letter

demanded that the transfer value be recalculated and payment of the differential be made within 20 business days, with interest, or the Applicant would pursue litigation in this Court.

[10] On May 12, 2022, the Applicant received the Letter in response. The Letter indicated awareness of the Applicant's litigation before the Ontario Superior Court of Justice and stated that the Applicant's request that his transfer value be re-evaluated should be forwarded to a lawyer at the DOJ.

[11] The Applicant brought an application for judicial review of the Letter. The Respondent brought a motion to strike this application for judicial review.

B. *Order Subject to Appeal*

[12] AJ Horne granted the Respondent's motion to strike the application for judicial review.

[13] AJ Horne outlined the high threshold on a test for a motion to strike an application, noting that there must be an obvious, fatal flaw going to the root of the Court's power to entertain the application. In other words, there must be a "show stopper" or "knockout punch" and the application must be "doomed to fail" (*Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33).

(1) The Letter is not a "Matter"

[14] AJ Horne found that the Letter is not a "matter" within the meaning of subsection 18.1(1) of the Act. AJ Horne noted that the Act permits judicial review "by anyone directly affected by a matter in respect of which relief is sought," which provides for a broader scope than a mere decision or order of a federal body. He also noted that a continuing course of conduct could be the subject of an application for judicial review.

[15] AJ Horne first found that the Applicant's Notice of Application does not refer to the subject of the application for judicial review as a "matter" or a continuing course of conduct and, rather, describes the Letter as a decision to deny the Applicant's request for recalculation of his transfer value. Assessing the essential character of the Notice of Application, AJ Horne also found that even on a broad reading, it does not challenge a course of conduct. He found that the DOJ made a decision on the Applicant's pension calculation in 2008/2009 and has maintained a consistent position since then.

[16] AJ Horne found that this case is distinguishable from the decision in *Canadian Broadcasting Corporation v Canada (Attorney General),* 2016 FC 933 ("*Canadian Broadcasting Corporation*"), where this Court found that the Canadian Broadcasting Corporation's challenge of an ongoing refusal by the Court Martial Administrator to provide unredacted copies of court martial decisions constituted a continuing course of conduct (at para 27). AJ Horne found that in this case, unlike in *Canadian Broadcasting Corporation*, the Respondent has maintained a single position since 2008/2009, namely that the lump sum payment was an *ex gratia* payment and

therefore not part of the Applicant's pensionable earnings. AJ Horne found that the core of the underlying application judicial review is actually seeking to challenge the pension valuation decision made in 2008/2009.

[17] AJ Horne found that the case at hand is analogous to that in *Save Halkett Bay Marine Park Society v Canada (Environment)*, 2015 FC 302 ("*Save Halkett Bay Marine Park Society*"), which considered whether a single decision or a course of conduct was under review and, consequently, whether the 30-day limitation period applied. This Court found that the Notice of Application was solely directed to the Minister's decision to issue a permit and therefore did not challenge a course of conduct (*Save Halkett Bay Marine Park Society* at paras 78-81). AJ Horne reached the same conclusion in the Applicant's case, in which the Notice of Application does not challenge a course of conduct, directly or on a broad reading.

[18] AJ Horne considered the supplemental affidavit proffered by the Applicant, disregarding those portions that are plainly argumentative. The Applicant's affidavit states that in his June 14, 2015 letter to the Minister, he requested revocation of his pension option and then, in March 2021, made email requests for a recalculation of his pension. AJ Horne found that the Applicant's Notice of Application does not expressly distinguish between requests for and decisions regarding revocation and recalculation. AJ Horne further found that any allegation of two separate decisions with respect to revocation and recalculation is unsupported by the Applicant's documents in his motion materials.

[19] AJ Horne concluded that the decision to characterize the settlement payment as *ex gratia* was made in 2008/2009 and his letter from June 14, 2015 letter expressly requested recalculation. No separate and distinguishable request for revocation and/or recalculation was made as early as 2015, when the Applicant should have known and pursued this request. Concerning the 30-day limitation period for filing an application for judicial review that applies to all decisions of a federal body, AJ Horne found that the Applicant was aware of the Respondent's characterization of the lump sum as an *ex gratia* payment since at least 2015. The Applicant had an opportunity to challenge this decision as early as 2015 and failed to do so.

(2) The Letter is not a "Decision"

[20] AJ Horne also found that the Letter is not a "decision" within the meaning of the Act. He found that on a plain reading of the Letter, it does not reflect a conclusion reached following consideration, does not affect the Applicant's legal rights or alter the *status quo* of the dispute between the Applicant and the DOJ, and does not determine any of the Applicant's substantive or procedural rights (*Air Canada v Toronto Port Authorit*y, 2011 FCA 347 at paras 28-29; *Prince v Canada (National Revenue)*, 2020 FCA 32 at para 21).

[21] AJ Horne characterized the Letter as, at best, a courtesy response. He noted that a courtesy response has been found by this Court as failing to create a new decision that can form the subject of a judicial review, as it does not represent a fresh exercise of discretion (*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).

[22] AJ Horne disagreed with the Applicant's submission that the Letter constitutes a tacit denial of his request for recalculation of his pension entitlements and is therefore grounds for judicial review. He found that the Letter indicated a tacit denial to engage in communication with the Applicant's counsel and that this does not trigger rights to judicial review of a decision made several years earlier. AJ Horne concluded that the Letter is not a fresh exercise of discretion and is therefore not a "decision" within the meaning of subsection 18.1(2) of the Act.

[23] For these reasons, AJ Horne found that the Respondent met the high burden to strike a Notice of Application at a preliminary stage. He therefore ordered that the application be struck, without leave to amend, and that costs be awarded to the Respondent in the amount of $800, for preparation and filing of a contested motion.

III. Issue and Standard of Review

[24] The sole issue is whether AJ Horne erred in striking out the application for judicial review.

[25] The applicable standard of review for an appeal for a discretionary order of an associate judge is palpable and overriding error for questions of fact and questions of mixed fact and law, and correctness for questions of law and questions of mixed fact and law where there is an extricable legal principle at issue (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 ("*Hospira*") at paras 64, 66, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 17-37). I note that references to "prothonotary" in this case and other relevant jurisprudence is hereby replaced by reference to "associate judge", as per sections 371 and 372

of the *Budget Implementation Act, 2022, No. 1*, SC 2002, c 10, amending the *Judges Act*, RSC 1985, c J-1. In *Hospira,* the Federal Court of Appeal notes that the Court should only interfere in discretionary orders of associate judges where "such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (at para 64). The principles laid out in *Hospira* have been consistently applied, including in recent decision in *Alam v Canada (Attorney General)*, 2022 FC 833.

[26] In my view, AJ Horne did not commit an extricable error of law. This Court only interferes with the Order if it involved a palpable and overriding error regarding a question of fact, or a question of fixed fact and law.

[27] In *Lill v Canada (Attorney General)*, 2020 FC 551, this Court noted that the Federal Court of Appeal has described a palpable and overriding error as "an error that is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of reasons" (at para 25, citing *Madison Pacific Properties Inc. v Canada*, 2019 FCA 19 at para 26; *Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 5).

IV. <u>Preliminary Issue</u>

[28] The Applicant's Notice of Motion simultaneously seeks an appeal of AJ Horne's Order pursuant to Rule 51 and an extension of time to file the appeal under Rule 51.

[29] The Applicant's submissions are largely vague as to the reasons for the request for an extension of time. He only states that there was a "reasonable excuse" for his delay in filing his motion to appeal the Order outside the 10-day limitation period stipulated in Rule 51(2), and there are "special circumstances" present that warrant an extension of time pursuant to Rule 8.

[30] The Respondent contests the Applicant's request for an extension of time and submits that it would not be in the interests of justice to grant this request. The Respondent contends that the Applicant has failed to meet the test for an extension of time, nor has he sufficiently satisfied the Court of the overriding consideration that justice must be done between the parties (*Soprema Inc. v Canada (Attorney General)*, 2022 FC 880 at paras 16, 19). The Respondent further submits that the Applicant has failed to provide a reasonable explanation for his lack of attempts to file his motion to appeal the Order until more than two months after the deadline.

[31] I agree with the Respondent. The Applicant's submissions are sparse and insufficient to satisfy the test for an extension of time. He has failed to provide a reasonable explanation for the delay and has not demonstrated that justice would be done between the parties. Since the Applicant's extension request is accompanied by a motion to appeal the Order of AJ Horne, and his materials appear to request that this Court dispense with both matters simultaneously, I will consider the issue of the Applicant's appeal of the Order on its merits.

V. Analysis

[32] AJ Horne did not make a palpable or overriding error to warrant this Court's intervention.

[33] AJ Horne properly considered the record, applied the appropriate legal principles, and conducted a thorough assessment of the grounds for striking the application for judicial review. AJ Horne's Order involved a thorough analysis of whether the Letter constituted a reviewable "matter" and whether it could be qualified as a "decision", assessing all the relevant evidence in light of the jurisprudence. AJ Horne arrived at the justified conclusion that it is neither a "matter" nor a "decision" within the meaning of the Act. He reasonably concluded that the Respondent met the high burden for striking the application at a preliminary stage.

[34] AJ Horne also properly considered the evidence before him and reasonably decided to consider only those portions of the Applicant's supplementary affidavit that do not contain argumentation. He applied the relevant jurisprudence in making this decision regarding the affidavit and its admissibility on this motion.

[35] The Applicant's submissions on this motion to appeal AJ Horne's Order contains various irrelevant and vague submissions that fail to raise a palpable and overriding error in the Order such that this Court should intervene. His assertions that AJ Horne's references to the lump sum payment as an *ex gratia* payment is an overriding error, that he has exhausted all internal remedies, and that the Respondent is concealing an unlawful *ex gratia* policy scheme, among other unclear and largely unsubstantiated claims, are insufficient to meet the high burden to appeal AJ Horne's order.

VI. Conclusion

[36] It is not this Court's role to challenge an associate judge's discretion absent a palpable and overriding error. AJ Horne's Order does not contain such an error to warrant this Court's intervention. The Applicant's motion to appeal AJ Horne's decision is dismissed, with costs.

ORDER in T-1104-22

THIS COURT ORDERS that the Rule 51 motion to appeal the AJ Horne's Order is dismissed, with costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1104-22
STYLE OF CAUSE:	JOHN MCLAUGHLIN v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING PURSUANT TO RULE 51 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	AHMED J.
DATED:	MARCH 16, 2023

WRITTEN SUBMISSIONS BY:

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