Federal Court  Cour fédérale

Date: 20231222

Docket: T-1097-23

Citation: 2023 FC 1743

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 22, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

DAVE BERNARD

Applicant

and

ABÉNAKI OF WÔLINAK COUNCIL
and
MICHEL R. BERNARD, STÉPHAN LANDRY, MARTINE BERGERON-MILETTE, MANON BERNARD, KAROLANE LANDRY-MENSAH

Respondents

ORDER AND REASONS

[1] The applicant, Dave Bernard, has brought a motion to this Court pursuant to section 75, subsection 84(2) and section 312 of the *Federal Courts Rules*, SOR/98-106 [Rules] for leave to

amend the notice of application he filed on May 25, 2023, concerning an application for judicial review, and to file an amended affidavit, as well as two additional affidavits.

[2] The history of the application for judicial review is as follows. The applicant has worked for years for the Abénaki of Wôlinak Council (the Council), as general manager of administration. On May 25, 2023, the applicant filed a Notice of Application for Judicial Review of the decision of the Council, comprised of Chief Michel Bernard and councillors Stéphan Landry, Martine Bergeron-Milette, Manon Bernard, and Karolane Landry-Mensah (the respondents), relating to the adoption of a resolution of the Council by which it terminated the applicant's employment.

[3] In his Notice of Application, the applicant states that the adoption of the resolution is illegal and irregular. He claims that prior to this resolution, he was subjected to harassment by respondent Landry (the Chief of the Council). In the absence of an appropriate response from the Council, on November 21, 2023, the applicant filed a complaint regarding the prevention of harassment and violence in the workplace, under subsection 127(1.1) of the *Canada Labour Code*, RSC 1985, c L-2.

[4] The applicant states that on the day following the filing (November 22, 2023), three members of the Council, namely respondents Landry, Bergeron-Milette and Bernard, adopted a resolution of the Council to suspend the applicant from his duties, with pay, for an indefinite period. Subsequently, the respondents adopted resolution RBC-2023-2024-012 (the Resolution)

on May 4, 2023, to proceed with the immediate dismissal of the applicant. This decision is the subject of the underlying application for judicial review.

[5] The Notice of Application, filed on May 25, 2023, argues that the resolution is illegal and irregular because, among other reasons, respondent Landry could not participate in the debates surrounding the adoption of such a resolution, being personally targeted by the harassment complaint.

[6] On June 22, 2023, the applicant filed his affidavit. On August 7, 2023, the respondents filed their affidavits. The parties agreed to extend the deadline for cross-examination to October 11 and completed it. Under subsection 309(1) of the Rules, the applicant must file his record within 20 days of the end of cross-examination. The respondents must then file their records within 20 days of service of the applicant's record (subsection 310(1) of the Rules).

[7] However, on November 30, the applicant filed his Notice of Motion. He is seeking the Court's approval to file an amended Notice of Application and affidavit, as well as two additional affidavits. According to his amended affidavit, the applicant states that respondent councillor Manon Bernard confided in him on May 13, 2023, that she had no choice but to vote in support of the resolution dismissing him, as she was in debt and owed money to respondent councillor Martine Bergeron-Milette. The applicant states that he has obtained two other affidavits, dated October 30, 2023, recounting the versions of two other witnesses, who confirm that respondent Bernard confided in them that she was obliged to vote for the applicant's dismissal because she owed a debt to someone and had no choice.

[8] It should be noted that the allegations were not subject to cross-examination, and the respondents were not given the opportunity to submit evidence contradicting them.

[9] The applicant argues that his motion should be granted because the affidavits establish that respondent Bernard had been placed in a conflict of interest situation during the adoption of the resolution dismissing him, and this fact is determinative of the outcome of the original application. He states that he tried unsuccessfully to obtain affidavits from other witnesses to the statements made by respondent Bernard, to corroborate his testimony. As soon as he succeeded in obtaining the other affidavits, he submitted his motion record.

[10] The respondents argue that the motion should be dismissed because the alleged conversation between the applicant and respondent Bernard took place on May 13, 2023, several weeks before the applicant filed his Notice of Application and more than a month before he filed his affidavit. According to the respondents, it is obvious that the applicant split his case. The central allegation in his original Notice of Application was that respondent Landry had placed himself in a conflict of interest by voting in favour of the resolution. After finding, during cross-examination, that Mr. Landry had not done so, the applicant suddenly made new allegations against another of the respondents.

[11] The applicant’s motion has two closely related elements. He seeks the Court’s approval under section 75 of the Rules to file an amended Notice of Application to include his allegations arising from his conversation with respondent Bernard. He also seeks the Court’s leave under subsection 84(2) and section 312 of the Rules to file an amended affidavit and two other

affidavits. The overall factors relevant to the two elements are quite similar, but there are some peculiarities regarding the filing of additional evidence.

[12] Section 75 of the Rules states that the Court "may, . . . at any time, allow a party to amend a document, on such terms as will protect the rights of all parties." In *Canderel Ltée v Canada (CA)*, [1994] 1 FC 3, the Court of Appeal stated as follows:

> [W]hile it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[13] For the additional affidavits, as well as the amended affidavit that the applicant wishes to file, subsection 84(2) and section 312 of the Rules apply. There are two preliminary requirements that the applicant must satisfy under section 312 of the Rules: (i) the evidence must be admissible on the application for judicial review; and (ii) the evidence must be relevant to an issue that is properly before the reviewing court: see *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 [*Forest Ethics*] at para 4.

[14] The factors to be considered in deciding whether or not to allow the moving party to file another affidavit after cross-examination are well summarized by Justice Cecily Strickland in *Havi Global Solutions LLC v IS Container PTE Ltd*, 2020 FC 803 [*Havi Global*] at para 6:

> i. the relevancy of the proposed evidence;
>
> ii. whether the proposed evidence was available and/or could be anticipated as being relevant prior to the cross-examinations;
>
> iii. absence of prejudice to the opposing party;
>
> iv. whether the proposed evidence assists the Court in making its final determination; and
>
> v. whether the proposed evidence serves the interests of justice.

[15] In *Havi Global*, Justice Strickland also noted that in *Campbell v Elections Canada*, 2008 FC 1080, paragraphs 25–27, Justice Luc Martineau mentioned that the Court has a "vast discretion to allow a party to file additional material [and] [s]uch discretion is incompatible with a mechanical application of any set test or formula".

[16] Both analytical frameworks seek to balance a number of competing considerations, including ensuring that justice is done all and that the Court is able to determine the real issues between the parties, avoiding prejudicing the opposing party and unnecessarily delaying the process. The law eschews rigid formulas in favor of a broad discretion that takes into account the unique circumstances of each case. The exercise of the Court's discretion must also take into account the procedural context of the application, in this case an application for judicial review.

[17] The context is important, as the law stipulates that an application to the Court for judicial review "shall be heard and determined without delay and in a summary way": subsection 18.4(1) of the *Federal Courts Act*, RSC 1985, c F-7.Consistent with this statutory direction, this Court and the Federal Court of Appeal have consistently discouraged interlocutory procedural motions

in the context of applications for judicial review: see *David Bull Laboratories (Canada) Inc v Pharmacia Inc* (CA), [1995] 1 FC 588.

[18] The Rules that apply to an application for judicial review reflect the summary nature of the procedure. The application must be commenced within 30 days of the decision (section 18.1); the applicant must file his or her evidence (including affidavits and documents in his or her possession) within 30 days of the filing of the notice of application (section 306), and the respondent must file his or her evidence within 30 days thereafter (section 307). Cross-examination must take place within 20 days of the filing of the respondent's evidence (section 308). Then the applicant files his or her case within 20 days of the end of the cross-examination, and the respondent files his or her case within the following 20 days (sections 309 and 310). The final stage is the request for a hearing, which must be filed within 10 days of the respondent's filing (section 314). These short deadlines reinforce the summary nature of the procedure and the general intention to ensure that the case is heard without delay.

[19] In this light, certain general factors take on a different hue. For example, the idea that an applicant should present his or her best case as early as possible is more important in the context of an application for judicial review because of the summary nature of the proceedings: see *Havi Global* at para 59, citing *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at para 9.

[20] To begin with, I agree that the additional evidence satisfies the two preliminary criteria set out in *Forest Ethics*. The affidavits are admissible in the application for judicial review, and the evidence is relevant to the overriding issue of procedural fairness in this case.

[21] In this case, the applicant maintains that he decided not to refer to the discussion he had with the respondent Bernard until he obtained corroborating evidence, owing to the seriousness of these allegations. This works against the applicant. I agree with the respondents that the seriousness of these allegations indicates that it should have been raised sooner rather than later.

[22] Another factor working against the applicant is that the addition of new allegations and affidavit evidence will inevitably delay the hearing of the case. Further cross-examinations and affidavits would likely be required.

[23] However, I must weigh other important considerations. This proceeding concerns a decision by an elected council to suspend and dismiss one of its most senior employees. This has important consequences, not only for the parties directly involved, but for the community, which must have confidence in the integrity of the council that represents and acts for them. The applicant's allegations are serious; moreover, the new allegations included in the new evidence still bear on the question of the legality of the manner in which the council passed the resolution.

[24] Finally, I am of the opinion that the allegations raised in the amended notice of application and the two new affidavits are relevant, probative and have the capacity to influence the final outcome of the judicial review (*Forest Ethics* at para 18). I will therefore grant the applicant's motion to file an amended notice of application and two new affidavits.

[25] However, I will not grant the applicant the right to file an amended affidavit. There is no excuse for delay in making such important and serious allegations. The applicant was aware of

them long before he filed his notice of application and original affidavit. Waiting for corroborating evidence is not a valid excuse for not including these elements as soon as possible. For these reasons, the applicant's motion for leave to file an amended affidavit is denied.

[26] Counsel should contact the Registry to indicate their availability for a case management conference as soon as possible in January 2024, in order to establish a timetable for the next steps in this matter.

[27] In all the circumstances, and in view of the mixed outcome of the application, it is appropriate to leave the question of the costs of this application to the final decision in the case.

ORDER in T-1097-23

THIS COURT ORDERS as follows:

1. The motion is decided as follows:

    a. Leave to file an amended notice of application: allowed.

    b. Leave to file an amended affidavit for applicant: dismissed.

    c. Leave to file the two additional affidavits: allowed.

2. The question of costs is reserved for the judge hearing the application for judicial review.

"William F. Pentney"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1097-23
STYLE OF CAUSE:	DAVE BERNARD v ABÉNAKI OF WÔLINAK COUNCIL ET AL
PLACE OF HEARING:	VIA VIDEOCONFERENCE
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APPEARANCES:

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