Federal Court  Cour fédérale

Date: 20120306

Docket: T-1881-11

Citation: 2012 FC 292

Vancouver, British Columbia, March 6, 2012

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

GEORGE EDWARD BOULOS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Respondent, the Deputy Attorney General of Canada, seeks an order dismissing the application for judicial review on the grounds that the proceeding is both premature and untimely.

Facts

[2] The facts relevant to this motion are not in dispute. They can be gleaned from the Notice of Application, the Applicant's affidavit dated November 25, 2011 filed in support of the underlying application, and the affidavit of Anne Law dated March 25, 2011 filed by the Respondent on this motion.

[3] The Applicant was employed as an income/excise tax auditor at the Burnaby-Fraser Tax Services Office of the Canada Revenue Agency (CRA). In April 2010, the Applicant referred to adjudication six grievances before the Public Service Labour Relations Board (PSLRB) under paragraph 209(1)(b) of the *Public Service Labour Relations Act*, SC 2003, c.22 [*PSLR*A].

[4] By letters dated May 10, 2010 and June 2, 2010, the CRA raised objections to the jurisdiction of the PSLRB to hear all six grievances. The Applicant responded to the CRA's objections by letters dated May 27, 2010 and June 8, 2010.

[5] On April 6, 2011, Ms. Martine Paradis, a Case Management Officer with the PSLRB, wrote to the parties to advise them of instructions issued by the adjudicator who had been assigned to the grievance files. The adjudicator was of the view that the employer's objections to the adjudicator's jurisdiction and other preliminary matters could not be adequately addressed by means of a pre-hearing conference call. As a result, the adjudicator issued various directions to address pre-hearing concerns. The Applicant's request for leave to amend his grievances by adding an award for exemplary damages and his requests for disclosure of information were denied. The adjudicator set out in detail the order of proceedings for the hearing of the grievances.

[6] The Applicant submitted a letter on April 11, 2011 questioning the adjudicator's decisions. The Applicant expressed concern that the PSLRB's letter did not make reference to his letter dated June 8, 2010. He therefore asked that the denial of his requests for disclosure of information be reconsidered.

[7] By letter from the PSLRB dated August 27, 2011, the Applicant was informed that a new adjudicator (Adjudicator) had been assigned to hear his grievances. The letter stated that the Adjudicator had analyzed the adjudication files and requested that the Applicant make submissions by September 7, 2011 as to why the Applicant's grievances, other than the one alleging wrongful dismissal (PSLRB Reference No. 566-34-3617), were adjudicable. The Applicant responded on August 21, 2011 that most or all of the issues raised had already been addressed in his letters dated April 22, 2010, May 27, 2010 and June 8, 2010.

[8] On September 13, 2011, the Adjudicator directed the Applicant to confirm that no disciplinary action had been imposed by the employer in relation to three grievances, and to make submissions regarding the adjudicability of the two other grievances. The Applicant did not comply with the directions, and instead submitted a letter dated September 15, 2011 requesting clarification of the directions, and the intentions of the Adjudicator.

[9] On September 19, 2011, the Adjudicator determined that the CRA's jurisdictional objections would be dealt with by written submissions, except for the grievance alleging wrongful dismissal, and fixed a timetable for submission of the parties' written arguments.

[10] By letter dated September 21, 2011, the Applicant took issue with the Adjudicator's decision to deal with the jurisdictional issues by way of written submissions on the grounds that he would be deprived of procedural fairness. His letter concludes as follows:

> With respect to the adjudicator's decision to deal with the jurisdictional issues by way of written submissions without first seeking the parties' positions for such a course, I am hereby raising my exception to this decision and course of action since I know that, in order to at least prove the element that my grievances relate to discipline for which I have the onus of supporting, I intently desire or require the evidence that is only available through the oral testimony of witnesses. I will otherwise be deprived of procedural fairness. It further makes little sense to me to fragment and scatter the separate the separate jurisdictional elements that need to be supported for paragraph 209(1)(b) of the *PSLRA* to apply to my largely inextricably intertwined grievances to be adjudicable through duplication of effort particularly when I have both very limited resources and am also self-represented and since I will also need to support "discipline" in my termination grievance at an oral hearing since the Employer is also objecting to the Board's jurisdiction to hear that grievance on a similar basis. Such inefficient or duplication of proceedings is also known to me to be generally avoided by the Board in similar situations and so I could only guess why this adjudicator would [chose] to stray from that normal practice which even the past adjudicator, whose recusal I felt compelled to seek, knew to avoid.

[11] On October 4, 2011, the Adjudicator directed that the Applicant be informed that the decision to proceed on the basis of written submissions would stand, and that the Applicant was expected to fully participate in the process. The next day, the Applicant reiterated his objections to the adjudicator's decision and repeated his concerns about the lack of procedural fairness.

[12] On October 7, 2011, the Adjudicator confirmed that the directions on the written submission process would stand. The Applicant submitted another letter on October 8, 2011 asking the Adjudicator to confirm "what appears to be an inevitable outcome". By letter from the PSLRB dated October 12, 2011, the Applicant was advised that the Adjudicator could not prejudge the case before he or she considers all submissions.

[13] The Applicant did not file any written submissions as directed by the Adjudicator. He instead brought the present application for judicial review to challenge the adjudicator's decisions dismissing the Applicant's objections to the written submission process being used to deal with the jurisdictional objections raised by the CRA. The proceeding was commenced in error before the Federal Court of Appeal and was subsequently transferred to the Federal Court by Order of Mr. Justice David Stratas dated November 17, 2011.

[14] In deference to the Court, the Applicant's grievances have been held in abeyance by the PSLRB pending disposition of the present application.

Analysis

[15] In *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) [*David Bull Laboratories*], the Federal Court of Appeal concluded that the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. The rationale for this ruling was that judicial review proceedings are designed to proceed expeditiously and motions to strike have the potential to unduly and unnecessarily delay their determination.

[16] However, the Federal Court of Appeal also recognized in *David Bull Laboratories* that there may be some exceptions to the general rule, as expressed at para 15:

> This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.

[17] Proceedings that are premature fall within the limited category of exceptional cases. Both the Federal Court of Appeal and this Court have consistently declined jurisdiction and dismissed applications to judicially review tribunal decisions where the process before the tribunal has not been exhausted.

[18] In *Greater Moncton International Airport Authority v Public Service Alliance of Canada*, 2008 FCA 68, the Federal Court of Appeal concluded that judicial review of interlocutory decisions should only be undertaken in the most exceptional of circumstances. The basic concern in limiting a party's access to the Court to challenge an interlocutory decision is that the litigation may become unnecessary in light of the tribunal's ultimate decision.

[19] Moreover, in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, the Federal Court of Appeal confirmed that parties must exhaust their rights and remedies under the administrative process before pursuing any recourse to the courts. Mr. Justice David Stratas, speaking for the Court, stated as follows at para 31:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature

> judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[20] The Applicant seeks to challenge the Adjudicator's decision to determine the CRA's jurisdictional objections by way of written submissions; however, no decision on the merits of the employer's objections has yet been made. In the circumstances, I agree with the Respondent that the present proceeding is premature.

[21] The application for judicial review is based on speculation by the Applicant that the Adjudicator will ignore his submissions and that the outcome of his grievances is pre-determined and inevitable. It remains that the adjudicator is master of his or her own proceedings. In fact, section 227 of the *PSLRA* specifically authorizes an adjudicator to decide any matter referred to adjudication without holding an oral hearing.

[22] The Applicant does not dispute that there are three options open to the Adjudicator after considering the written submissions of the parties. First, the Adjudicator could grant the employer's objections and dismiss some or all of the five grievances on the basis that he or she has no jurisdiction to hear them. Second, the Adjudicator could dismiss the employer's objections and rule that he or she has jurisdiction to hear the grievances. Third, the Adjudicator could conclude that it is

impossible, based on the written submissions filed by the parties, to decide the issue without having an oral hearing.

[23] In any of the above three scenarios, an application for judicial review may become unnecessary in light of the Adjudicator's decision based on the record before him or her. Being substantially in agreement with the written representations filed on behalf of the Respondent, which I adopt and make mine, I conclude that the decision being impugned in the Notice of Application is interlocutory, as opposed to jurisdictional, in nature, and that no special circumstances have been established that would warrant the Court's intervention at this stage. The Applicant should simply wait for the Adjudicator to rule on the matters before him or her and then decide whether there are any grounds for judicial review.

[24] The Applicant complained in his letter dated September 21, 2011 about fragmentation, inefficiencies and duplication of the proceedings that would result from the written submission process dictated by the Adjudicator. Ironically, the Applicant has, by bringing the present application, continued the very mischief he sought to avoid.

[25] I conclude that there are no exceptional circumstances in the present case that would warrant the Court's early intervention. The application for judicial review shall accordingly be dismissed.

[26] In light of the above conclusion, it is not necessary to address the Respondent's alternative argument that the proceeding should be dismissed on the grounds that it is untimely. As for costs of the motion, I see no reason to deviate from the general rule that costs should follow the event.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. Costs of the motion, hereby fixed in the amount of $750.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1881-11
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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ANNE-MARIE DUQUETTE	FOR THE RESPONDENT

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