Federal Court Cour fédérale

Date: 20191203

Dockets: T-1762-18
T-256-19

Citation: 2019 FC 1554

Ottawa, Ontario, December 3, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

MIKE STANOIEVICI

Applicant

and

LTS SOLUTIONS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mike Stanoievici, worked at LTS Solutions in Kamloops, British Columbia, until November 23, 2016, when LTS terminated his employment. This termination prompted Mr. Stanoievici in early February 2017 to file a complaint of alleged unjust dismissal [the Complaint] with Employment and Social Services Canada [ESSC]. After mediation efforts failed, ESSC offered, and Mr. Stanoievici accepted, the option to refer the Complaint to an

adjudicator under what was then subsection 241(3) of the *Canada Labour Code*, RC 1985, c L-2 [the *Code*] (this subsection was repealed earlier this year in July).

[2] The Minister of Labor appointed the first adjudicator to hear the Complaint in mid-August 2017. As of the date of these two applications for judicial review, the Minister has appointed five different adjudicators to hear the Complaint. Mr. Stanoievici has accused four of these adjudicators of bias and of being unable to conduct a fair and reasonable adjudication process.

[3] Mr. Stanoievici, who represents himself in this proceeding, has applied under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of three procedural orders made by two different adjudicators; namely, Mr. Jack Gerow and Mr. John Thorne, each of whom recused himself following Mr. Stanoievici's allegations of bias.

[4] The first application for judicial review (T-1762-18), filed on October 4, 2018, concerns Mr. Gerow's pre-hearing order dated October 2, 2018, in which he ordered a brief adjournment of the hearing, a pre-hearing conference, and the production of documents. The second application (T-256-19), filed on February 6, 2019, relates to Mr. Thorne's December 14, 2018 and January 13, 2019 adjournment orders.

[5] Each application raises a determinative issue as to whether it is premature or moot. For the following reasons, I find the applications are premature and moot and, therefore, each application is dismissed.

I. Background

[6] As noted above, the Minister appointed the first adjudicator, Frank Borowicz, to hear the Complaint in mid-August 2017. Mr. Borowicz resigned from his role as an adjudicator near the end of September 2017 to avoid any perception of conflict, following a conversation with Mr. Stanoievici and LTS's counsel. The Minister then appointed James Dorsey as adjudicator in mid-October 2017.

[7] In late January 2018, Mr. Stanoievici sent a letter to the Minister and to the Director General of the Federal Mediation and Conciliation Services [the Director], alleging that Mr. Dorsey was biased because he did not consider Mr. Stanoievici's input. Mr. Stanoievici stated his frustrations with the adjudication process, specifically with the delays in the scheduling of his hearing. In his letter, Mr. Stanoievici also stated his disagreement with Mr. Dorsey's proposed schedule for pre-hearing disclosure of documents.

[8] Following Mr. Stanoievici's letter, Mr. Dorsey sent a letter to the Director in early February, informing the Director of his withdrawal from his role as adjudicator because Mr. Stanoievici's allegations indicated a loss of confidence in his impartiality. Near the end of February, the Minister appointed Mr. Gerow as adjudicator to hear the Complaint.

[9] In early March 2018, Mr. Gerow informed the parties of his appointment and advised that he would hold dates in May and June 2018 for a hearing. After being informed of Mr. Gerow's appointment, the parties corresponded extensively as to suitable hearing dates and disclosure of

documentation. Near the end of August 2018, Mr. Gerow issued a notice of hearing scheduled for October 15, 2018.

[10] In late September 2018, LTS's counsel sent a letter to Mr. Gerow requesting that he order Mr. Stanoievici to immediately produce documents; that a pre-hearing conference be convened; and that the hearing be adjourned to provide time for production of documents and for a case management conference following the productions. Mr. Stanoievici responded to this request by stating that, although he had concerns about document production, he opposed the adjournment of the hearing because LTS intended to postpone the hearing for non-*bona fide* reasons by making unreasonable requests.

[11] On the second day of October 2018, Mr. Gerow ordered an adjournment of the hearing scheduled to commence on October 15, 2018 and rescheduled the hearing for November 2018. Mr. Gerow also informed the parties that he was prepared to mediate the merits of the Complaint. This is one of the orders Mr. Stanoievici asks the Court to review in this proceeding.

[12] Two days after Mr. Gerow's adjournment order, Mr. Stanoievici filed an application seeking judicial review of the order. On the same day, he requested that the Complaint proceedings be suspended pending conclusion of the judicial review. The following day Mr. Gerow withdrew as adjudicator because Mr. Stanoievici had alleged in his application for judicial review that Mr. Gerow had acted in a biased and unreasonable manner in his role as an adjudicator.

[13] After Mr. Gerow withdrew, the Minister appointed John Thorne as adjudicator in mid-October 2018. Mr. Thorne informed the parties of a new hearing process for the Complaint and set the hearing to take place during the next to last week of January 2019.

[14] After a series of communications between the parties, Mr. Stanoievici requested in early November 2018 that the hearing scheduled for January 2019 be stayed pending the outcome of the judicial review. Mr. Thorne denied this request. He then issued a notice of hearing for mid-December to start the cross-examination of one of LTS's witnesses (Ms. Denise Shine) as part of the adjudication of the Complaint.

[15] On the day scheduled for the cross-examination, Mr. Thorne decided to adjourn commencement of the cross-examination and the hearing of the Complaint pending the outcome of Mr. Stanoievici's human rights complaint against LTS before the Canadian Human Rights Commission [CHRC]. Mr. Thorne ordered that the hearing would be reconvened after the CHRC ruled on Mr. Stanoievici's human rights complaint.

[16] The day after this adjournment, Mr. Stanoievici indicated that he would be seeking judicial review of the adjournment decision. Upon being informed of Mr. Stanoievici's intention to seek judicial review, Mr. Thorne advised the parties that the Complaint hearing would be reconvened as soon as Mr. Stanoievici's human rights matter was finalized, regardless of the status of the judicial review application. Mr. Stanoievici then wrote to Mr. Thorne and asked him to reconsider the adjournment decision.

[17] During the first week of January 2019, Mr. Stanoievici again wrote to Mr. Thorne to request reinstatement of the Complaint hearing since he had received a decision from the CHRC not to deal with his complaint. Upon learning of the dismissal of the human rights complaint, Mr. Thorne proposed that the hearing could continue as scheduled later in January. He also indicated that the Complaint would follow the procedure previously established, and that he would deal with all the aspects of the Complaint, including any human rights issues.

[18] Mr. Thorne then attempted to schedule a case management conference call to sort out how the hearing would proceed, but Mr. Stanoievici refused to participate in the call. Due to Mr. Stanoievici's refusal to participate in the call and his continued questions about the hearing process, Mr. Thorne decided to adjourn the January hearing dates. On that same day, Mr. Stanoievici indicated to Mr. Thorne that he would proceed with his intended judicial review application. Mr. Thorne responded that, despite the judicial review application, he intended to set new hearing dates as soon as LTS's witness became available to attend the hearing.

[19] Mr. Stanoievici filed a second application for judicial review (T-256-19) on February 6, 2019. In this application, Mr. Stanoievici alleged that he no longer had confidence in receiving a fair, unbiased, and just decision from Mr. Thorne. After an exchange of emails between Mr. Thorne and Mr. Stanoievici, Mr. Thorne withdrew as adjudicator nine days after filing of the second judicial review application. The second judicial review application concerns Mr. Thorne's decisions to adjourn the hearing of the Complaint on October 2, 2018 and, again, on December 14, 2018.

[20] After Mr. Thorne's withdrawal, in mid-June the Minister appointed Fazal Bhimji as the fifth adjudicator to deal with the Complaint. Mr. Bhimji contacted the parties to canvas available hearing dates, the number of witnesses each party intended to call, and address any preliminary matters. Subsequently, Mr. Bhimji advised the parties that the hearing would be "*de novo*" and issued a notice of hearing of the Complaint commencing September 30, 2019.

[21] The parties advised the Court at the commencement of the hearing of this matter that the hearing of the Complaint did not proceed as scheduled on September 30th due to a medical issue involving Mr. Stanoievici. They also informed the Court that no new hearing date for the Complaint had been scheduled.

II. Analysis

[22] Although the parties have raised more than a dozen separate issues, it is unnecessary to address all of these issues because the only issue, in my view, is whether the applications for judicial review should be dismissed on a preliminary basis.

A. *The Parties' Submissions*

(1) *The Respondent's Submissions*

[23] The Respondent says these applications are improper and should be dismissed on a preliminary basis for three reasons. First, they are interim decisions and this Court will not review interim decisions except in exceptional circumstances, which do not exist in this case. Second, they are clearly moot, with the appointment of another new adjudicator and the

establishment of a new procedure. Third, it is clear and obvious that the applications cannot succeed.

(a) *Interlocutory decisions are not subject to judicial review*

[24] The Respondent views both Mr. Gerow's and Mr. Thorne's orders as interlocutory decisions which are not subject to judicial review because they relate to procedural issues leading up to the hearing of the Complaint. The Respondent maintains that, absent exceptional circumstances, judicial review of an interlocutory decision should not be undertaken.

[25] According to the Respondent, applications to overturn interlocutory decisions will normally be dismissed as premature, since parties should only go to court after exhausting all remedial recourses available in the administrative process. The exceptions to the rule, the Respondent says, are rare or exceptional cases where the effect of an interlocutory decision on an applicant is immediate and drastic.

[26] The Respondent claims there are no such rare or exceptional circumstances in this case. In the Respondent's view, Mr. Gerow's and Mr. Thorne's orders are ordinary procedural decisions made by labour adjudicators who have the statutory power to be the master of their own process. The Respondent says adjudicators take necessary pre-hearing measures to ensure a fair and efficient hearing.

[27] The Respondent notes that the adjournment in Mr. Gerow's order was minimal and allowed time for the parties to properly prepare for the hearing. According to the Respondent, the

production of documents prior to a hearing is a customary practice to avoid surprises in the course of a hearing that lead to unnecessary adjournments. The Respondent says pre-hearing conference calls between parties to ensure an efficient hearing are also commonplace.

[28] The Respondent contends that there are also no rare or exceptional circumstances to warrant judicial review of Mr. Thorne’s decision. In the first adjournment decision in December 2018, Mr. Thorne stated that the adjournment was to ensure two adjudicative bodies did not come to differing conclusions concerning the same facts and issues. According to the Respondent, the decision to adjourn the hearing pending the conclusion of the CHRC complaint was not only reasonable but also required.

[29] The Respondent further contends that Mr. Thorne’s second adjournment decision, in January 2019, was the result of Mr. Stanoievici’s continued questions about the hearing process, his reluctance to proceed with Ms. Shine’s evidence as proposed by LTS and agreed to by Mr. Thorne, and his refusal to participate in a case management call to determine how the hearing would proceed.

(b) *The applications are moot*

[30] The Respondent says the orders in this judicial review are moot because both Mr. Gerow and Mr. Thorne are now *functus officio*, a new adjudicator has been appointed, and the parties have agreed to a new pre-hearing and hearing procedure. The Respondent submits that these applications are inefficient and a waste of precious judicial resources.

[31] According to the Respondent, the remedies Mr. Stanoievici seeks are now obsolete; a declaration that the adjudicators failed to meet their legal duty and facilitate access to justice is now strictly academic. The Respondent says there would be no practical effect of awarding the remedies sought by Mr. Stanoievici.

[32] The Respondent notes that a court will generally refuse to entertain a judicial review application where the matter has become moot, except in exceptional circumstances. A matter is moot when, at the time of the court's decision, there is no live controversy or concrete dispute between the parties. The Respondent references the two-step analysis for determining whether an issue is moot in *Borowski v Canada (Attorney General)*, [1989] SCJ No 14 at para 16 [*Borowski*].

[33] The Respondent further notes that this Court has found an issue to be moot on judicial review when, by the time the application comes before the Court, events have overtaken the original grounds for bringing the application. According to the Respondent, a court will also dismiss a judicial review application where the resolution would serve no useful purpose, specifically where subsequent proceedings cure any procedural unfairness defects in the pre-hearing stage.

(c) *It is clear and obvious that the applications will not succeed*

[34] In its memorandum of fact and law, the Respondent makes a motion to strike the applications since it is clear and obvious that they will not succeed. The Respondent notes that where an application is moot, and the court determines that there is no relief, the application may

be struck. The Respondent contends that the applications are premature, moot, and no practical relief can be awarded by the Court. Based on this, it is plain and obvious in the Respondent's view that the applications cannot succeed.

(2) *Mr. Stanoievici's Submissions*

[35] Mr. Stanoievici does not make any submissions on the preliminary issues the Respondent raises with respect to the first judicial review application.

[36] With respect to the second judicial review application, he states that he disagrees with the Respondent's arguments that Mr. Thorne's orders are moot. In his view, Mr. Thorne's decision was not the live controversy or the issue in this judicial review. He says that the issue is the continued adjournment of his hearing.

B. *The Judicial Review Applications are Premature*

[37] I agree with the Respondent's position that both adjudicators' orders are interlocutory decisions leading up to the hearing of the Complaint and, therefore, not subject to judicial review because the circumstances of this matter are not rare or exceptional.

[38] The hearing of the unjust dismissal Complaint continues. The applications are premature because, as far as the Court is aware, Mr. Bhimji, the fifth adjudicator, has not yet rendered a final decision concerning the Complaint. He has not yet become *functus* (compare *Huneault v*

Central Mortgage & Housing Corp. [1981] FCJ No 905 at para 9; and *Fishing Lake First Nation v Paley*, 2005 FC 1448 at para 22).

[39] The principle of judicial non-interference with an on-going administrative proceeding in the absence of "exceptional circumstances" is well established. Justice Statas summarized the rationale for this principle in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point…
>
> [31] … 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.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway… Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience… Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge…

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the “exceptional circumstances” exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as “exceptional” and the threshold for exceptionality is high… Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted… the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. [Citations omitted]

[40] The Supreme Court of Canada endorsed this principle of judicial restraint in the context of an on-going or pending administrative proceeding in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, where Justice Cromwell (speaking for the Court) stated that:

> [36] …Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a “correctness” standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes… Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision… [Citations omitted]

[41] Absent exceptional circumstances, this Court should not interfere with the on-going administrative process involving Mr. Stanoievici before the adjudicator, until after that process

has been completed or until any available and effective remedies under the *Code* have been exhausted.

[42] There are no exceptional circumstances in this case. Each application for judicial review is, therefore, dismissed.

C. *The Judicial Review Applications are Moot*

[43] I also agree with the Respondent that the adjudicators' decisions are moot.

[44] The Supreme Court of Canada stated in *Borowski* that the doctrine of mootness "applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case" (at para 15). This involves a two-step analysis: (i) it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic; and (ii), if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case on its merits (at para 16).

[45] If there is "no longer a live controversy or concrete dispute", the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nevertheless necessary to determine whether the Court should exercise its discretion to hear and determine the case on the merits where circumstances warrant.

[46] Three overriding principles are to be considered in this second step of a mootness analysis: (i) the presence of an adversarial relationship (*Borowski* at para 31); (ii) the need to promote judicial economy (at para 34); and (iii) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (at para 40). The Court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and vice versa (at para 42).

[47] The Supreme Court in *Borowski* identified four instances where a court's discretion may be exercised to allow it to hear and decide a case, which might otherwise be moot. For example, if: (i) there is still the necessary adversarial relationship between the parties even though the live issue or concrete dispute no longer exists (at para 36); (ii) the Court's decision will have practical effect on the rights of the parties (at para 35); (iii) the case is one of recurring but brief duration, such that important questions might otherwise evade judicial review (at para 36); or (iv) where issues of public importance are at stake such that resolution is in the public interest, though the mere presence of a matter of national importance is insufficient (at para 39).

[48] In my view, the applications in this matter have been rendered moot because the decisions, which underlie Mr. Stanoievici's judicial review applications, have been superseded by Mr. Bhimji's appointment as the adjudicator to hear the Complaint and the procedures he established for hearing the Complaint. The prior adjudicators are *functus officio* and the prior procedures they established have been replaced by those instituted by Mr. Bhimji.

[49] I see no reason in the record, nor in the parties' submissions, which justifies the Court to exercise its discretionary power to determine Mr. Stanoievici's applications on the merits. First, there is no adversarial context with respect to Mr. Gerow's order. The parties agreed to a new procedure set out by a subsequent adjudicator, Mr. Thorne. There is no adversarial context regarding Mr. Thorne's orders as they became void following his recusal. A decision by the Court on the merits of the application will not have any practical effect on the parties' rights (*Snieder v Canada (Attorney General)*, 2016 FC 468 at para 15 [*Snieder*]).

[50] Second, as to judicial economy, an application for judicial review can be dismissed for mootness at the time of the hearing even without the necessity of a motion prior to the hearing (*Snieder* at para 16). The Court has already expended resources hearing this matter. Thus, in the circumstances of this case, judicial economy is not a factor.

[51] Third, the issues raised by these applications for judicial review do not raise important questions that might otherwise evade judicial review. The facts in this case are such that the parties' disagreement on the procedural steps set out in Mr. Gerow's and Mr. Thorne's orders has dissipated. Mr. Thorne's appointment extinguished Mr. Gerow's order and eliminated any controversy that may have emanated from that order. Mr. Thorne's recusal and the appointment of a fifth adjudicator, Mr. Bhimji, effectively eliminated any live controversy between Mr. Stanoievici and Mr. Thorne about procedural matters.

[52] Lastly, neither application concerns issues of such public importance that the resolution of such issues would be in the public interest.

[53] The Court declines, therefore, to exercise its discretion to review the decisions on their merits. There is no practical relief that may be awarded to Mr. Stanoievici by this Court.

[54] It is unnecessary to grant or refuse the Respondent's motion to strike the applications given my foregoing conclusions.

III. Conclusion

[55] In my view, there is no merit to Ms. Stanoievici's submissions. Both applications are dismissed on a preliminary basis because the adjudicators' orders in question were interlocutory decisions, which are not subject to judicial review. The decisions Mr. Stanoievici requests this Court to review are moot, and for the reasons stated above, the Court should not exercise its discretion to review them on their merits.

[56] As for costs, Mr. Stanoievici indicated at the hearing of this matter that he left this issue with the Court's discretion.

[57] The Respondent, however, proposed a lump sum amount of $10,000 for each application, for a total of $20,000.

[58] I am mindful of the fact that LTS offered to settle the applications on a without cost basis a few months before the hearing, but Mr. Stanoievici refused to so because he disagreed with LTS's position about the mootness of Mr. Thorne's decisions.

[59] LTS has been successful in this proceeding. Costs should therefore be awarded to LTS.

[60] Having regard to Mr. Stanoievici's financial situation (he indicated at the hearing he remains unemployed and is covering his expenses with his savings) and the fact that he received a reasonable offer to settle the matter prior to the hearing, together with the unfounded allegations of bias, Mr. Stanoievici shall pay to LTS costs in an all-inclusive lump sum of $500 within 30 days of the issuance of this judgment.

[61] A copy of this judgment and reasons shall be filed in each of Court Dockets T-1762-18 and T-256-19.

JUDGMENT in T-1762-18 and T-256-19

THIS COURT'S JUDGMENT is that: the applications for judicial review are dismissed; the Applicant shall pay to the Respondent costs in an all-inclusive lump sum of $500 within 30 days of the issuance of this judgment; and a copy of this judgment and reasons shall be filed in each of Court Dockets T-1762-18 and T-256-19.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1762-18 AND T-256-19
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