Federal Court Cour fédérale

Date: 20201006

Docket: T-1507-19

Citation: 2020 FC 952

Montréal, Québec, October 6, 2020

PRESENT: The Honorable Madam Justice St-Louis

BETWEEN:

MURLIDHAR GUPTA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Dr. Murlidhar Gupta, seeks judicial review of the August 15, 2019 decision by Natural Resources Canada [NRCan] that adopted an administrative investigation report.

II. Context

[2] Dr. Gupta is a research scientist who obtained his Ph.D. from Université Laval in 2002. The same year, Dr. Gupta was hired at CanmetENERGY, a division of NRCan's Innovation and Energy Technology Sector. Dr. Gupta first joined NRCan as a post-doctoral research fellow with the Zero-Emission Technology group of the Clean Electric Power Generation division, and in 2004, he became a research scientist (RES-01). On April 1, 2006, he was promoted to the RES-02 level and, in brief, in November 2010, he was reassigned to Bioenergy Systems in the Industrial Innovation Group.

[3] Over the years, Dr. Gupta submitted a series of dossiers to be considered for promotion from his current classification as a RES-2 to the RES-3 level. However, excluding years 2018 to 2020, which are pending, Dr. Gupta has been unsuccessful in achieving this promotion. Disputes ensued between the parties, mainly by way of grievances and judicial review applications. Ultimately, in June 2017, the parties agreed to and signed a Memorandum of Settlement, whereby an independent third party investigator would consider Dr. Gupta's allegations that his promotion dossiers had been improperly held back as a result of workplace disputes.

[4] Particularly relevant to these proceedings, considering the arguments raised, are articles 4, 8, 9(d) and 10 of the Memorandum of Settlement.

[5] Article 4 outlines the investigator's mandate: "[It] will be to review the workplace dispute elements that have been raised in the Employee's dossiers under the criteria of 'Relevant Factors' for the 2012-2017 years. The investigator will determine four issues :

> a) Whether the events alleged by the Employee occurred;
>
> b) Whether those events constitute workplace dispute activity that might have had an impact on Dr. Gupta's career path (the 'workplace dispute'); and
>
> c) Whether that workplace dispute, if any, had a negative impact on the Employee's application for a promotion; and
>
> d) If so, the extent of that impact and whether the Employee would have been promoted but for that workplace dispute."

[6] Article 8 states: "The investigator will provide a summary to both parties of the information obtained through these interviews, and provide both parties with an opportunity to make written submissions concerning that summary."

[7] Article 9 states: "[T]he Employer and Employee agree to be bound by the outcome of the investigation, and in particular […] (d) [t]he Employee and Employer agree not to apply for judicial review of the investigator's decision."

[8] Article 10 states: "If a dispute arises out of, or in connection with this Agreement, including any question regarding its existence, interpretation, validity or termination, the Parties shall attempt to resolve the dispute though good faith negotiation, and may, if necessary, and the Parties consent in writing, resolve the matter through mediation by a mutually acceptable mediator prior to commencing legal proceedings."

[9] The parties agreed on the selection of the investigating firm. The investigators conducted interviews with Dr. Gupta and with 10 other witnesses, and subsequently presented each witness with an outline of their declaration for acknowledgment and signature. In March 2019, the investigators submitted their Final Report, which contains 7 sections, including a section dedicated to the investigators' findings, outlining 9 of the witness interviews, in addition to that of Dr. Gupta.

[10] In May 2019, Dr. Gupta's counsel raised concerns regarding the investigators' non-compliance with article 8 of the Memorandum of Settlement, since no summary of the information had been provided to Dr. Gupta prior to the Final Report being issued. Dr. Gupta was then provided with the opportunity to submit additional comments on the entire Final Report.

[11] Dr. Gupta also raised concerns as to the investigators' statement that their request for Dr. Gupta's comments on his own interview notes was not acknowledged. Dr. Gupta indicated that he provided these comments, but this element remained peripheral in the parties' submissions in these proceedings.

[12] On June 19, 2019, Dr. Gupta provided his response to the investigators' Final Report by way of an 81-page submission, which included his comments as well as supporting documents such as a copy of one of the afore-mentioned declaration acknowledged and approved by the witness.

[13] On August 15, 2019, the investigators issued an Addendum to their Final Report and concluded, notwithstanding the review of Dr. Gupta's submissions, comments and documents, that the outcome of the investigation remained the same. The same day, the Acting Director, Workplace Management & Wellness of NRCan wrote to Dr. Gupta's counsel, accepting the Addendum, as detailed below.

[14] On September 16, 2019, Dr. Gupta commenced this Application for judicial review. As part of this Application, Dr. Gupta received the Certified Tribunal Record, which contained, *inter alia*, the declarations the witnesses' acknowledged following their interview.

III. The Impugned Decision

[15] As mentioned above, on August 15, 2019, the Acting Director, Workplace Management & Wellness of NRCan wrote to Dr. Gupta's counsel. He indicated that, further to the June 3, 2019 email, Dr. Gupta provided his final comments to the investigator who considered these comments in completing the Addendum to the Final Report. The Acting Director further indicated that, as they were then in receipt of the Addendum, the employer considered the issues Dr. Gupta had raised in his May 10 letter to be resolved and, given the investigators' conclusion, the employer also considered the matter closed.

[16] This August 15, 2019 message from the Acting Director, Workplace Management & Wellness is the decision subject to the present Application for judicial review.

IV. The Parties' Arguments

[17] Dr. Gupta submits that his employer breached principles of procedural fairness by rendering a decision based on an investigation that was not conducted in accordance with the process agreed upon by the parties. He adds that issues of procedural fairness remain reviewable without deference to the decision-maker. The question, he submits, is simply whether a fair and just process was followed, given all circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56).

[18] Dr. Gupta adds that the decision itself is subject to review under the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). He submits that the decision is based on unreasonable findings, and argues that (1) the evidence was misconstrued, misinterpreted and not properly considered; (2) the investigation failed to complete its mandate, as the investigators failed to clearly determine the extent of the impact of the workplace dispute and whether the Applicant would have been promoted "but for" the dispute (having concluded that it is impossible to know what the outcome would have been); and (3) his submissions were not meaningfully considered, as it is impossible to discern from the Addendum what consideration, if any, either the investigators or NRCan afforded his submissions, and as the investigators failed to address certain issues and evidence.

[19] The Attorney General of Canada (AGC) agrees that the Court must review the decision under the reasonableness standard. In response to Dr. Gupta's arguments, the AGC submits that (1) although the Final Report did not respect article 8 of the Memorandum of Settlement, the

investigative process subsequently undertaken satisfied both article 8 of the Memorandum of Settlement and the duty of fairness that was owed to Dr. Gupta, and (2) the employer's decision to accept the investigation report was reasonable.

[20] In addition, the AGC submits that the present Application is not properly before the Court, since Dr. Gupta failed to exhaust available alternative recourses before applying for judicial review. First, the AGC contends that in this case, the parties had established, through the Memorandum of Settlement, a process to resolve disputes arising out of or in connection with the Memorandum. Hence, as per article 10 of the Memorandum of Settlement, if the parties were unable to resolve the dispute through negotiation, they could seek to resolve the matter through mediation prior to commencing legal proceedings. Second, if Dr. Gupta was dissatisfied with the alternative remedy agreed upon in the Memorandum of Settlement, he ought to have exhausted the grievance process under section 208 of the *Federal Public Sector Labour Relations Act* (SC 2003, c 22, s 2) [the *Labour Relations Act*] prior to applying to this Court for a remedy.

[21] Dr. Gupta recognises that subsection 208(1) of the *Labour Relations Act* applies here, and that the grievance procedure is available to challenge the employer's August 15, 2019 decision to adopt the investigator's report. However, he argues that (1) he was no longer bound by articles 9 and 10 of the Memorandum of Settlement because of NRCan's breach of its article 8 (*Cohnstaedt v University of Regina* (SASK CA) [1994] SJ No 124; *Cohnstaedt v University of Regina* [1995] 3 SCR 451); (2) he is not bound by his renunciation of a statutory recourse as contained in the Memorandum of Settlement; (3) the *Labour Relations Act* grievance procedure cannot address procedural fairness issues, which are strictly within the purview of the Federal

Court on judicial review; and (4) since the grievance procedure has not yet been initiated, he could choose to proceed by way of an Application for judicial review before the Court.

V. Discussion

[22] The Court finds this Application for judicial review to be premature, as Dr. Gupta has not exhausted the available alternative remedies, hence negotiation in good faith as set out in article 10 of the Memorandum of Settlement and, in any event, the grievance procedure set out in subsection 208(1) of the *Labour Relations Act*.

[23] My conclusion does not stem from the parties' commitment, in the Memorandum of Settlement, not to apply for judicial review. It stems from the application of the exhaustion doctrine as summarised by the Federal Court of Appeal in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] (at paras 30-33):

> [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: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-

55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[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.

[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: see, e.g., *Consolidated Maybrun*, supra at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 1993 CanLII 3430 (ON SCDC), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). 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: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 1995 CanLII 1305 (BC CA), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians* (Ontario) (1991), 1991 CanLII 7126 (ON SC), 5 O.R. (3d) 439 (Gen. Div.). 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: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 at paragraph 48.

> [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: see, generally, D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at pages 485-494. 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: see *Harelkin*, supra; *Okwuobi*, supra at paragraphs 38-55*; University of Toronto v. C.U.E.W, Local 2* (1988), 1988 CanLII 4757 (ON SC), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[24] The Federal Court of Appeal has confirmed the applicability of the exhaustion doctrine in the more recent decisions of *Agnaou c Canada (Procureur général),* 2019 CAF 264 and *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 FCA 277.

[25] Of particular relevance to this proceeding, our Court has confirmed the application of the doctrine when the grievance procedure of the *Labour Relations Act* is available, see *Nosistel v Canada (Attorney General)*, 2018 FC 618 [*Nosistel*] at paras 50 to 53, where issues of procedural fairness in the investigation of the grievance had been raised. Dr. Gupta has not substantiated his

argument that the grievance procedure cannot address procedural fairness issues, especially as my colleague's decision in *Nosistel* points to the contrary.

[26] The Federal Court of Appeal in *CB Powell*, excerpted above, also specifically confirms that issues of procedural fairness do not qualify as *exceptional circumstances* allowing a party to be exempted from the exhaustion doctrine.

[27] Dr. Gupta has not convinced me that the doctrine of exhaustion does not apply when the statutory grievance procedure, although available, has not been commenced. There is no indication that such a set of facts reaches the *exceptional circumstances* threshold, as summarised above by the Federal Court of Appeal in *CB Powell.* On the contrary, the Federal Court of Appeal specifies that the doctrine applies until the available, effective remedies are exhausted. Dr. Gupta has recognised that the grievance procedure is available, and as per the clear directions from the Supreme Court and the Federal Court of Appeal, it must be exhausted before proceeding before this Court.

[28] Given the teachings of the Federal Court of Appeal on the exhaustion doctrine, and given that both parties recognise that the grievance procedure set out in subsection 208(1) of the *Labour Relations Act* is available to Dr. Gupta, I find the Application for judicial review to be premature and will dismiss it on that basis.

JUDGMENT in T-1507-19

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed;

2. Costs are granted in favour of the Respondent.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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