Federal Court  Cour fédérale

Date: 20201218

Docket: T-1071-19

Citation: 2020 FC 1167

Ottawa, Ontario, December 18, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SUKHJIT SINGH DHILLON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant brings a motion pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-103, to appeal the Order of the Honourable Prothonotary Aylen [the "Prothonotary"] dated September 1, 2020, striking the judicial review of the Applicant, without leave to amend, on the basis that it was premature due to the non-exhaustion of administrative remedies.

II. Background

[2] The Applicant in this case, Mr. Sukhjit Singh Dhillon [Mr. Dhillon] was a RCMP officer from October 2000 until May 31, 2019. He was dismissed from his job in an oral decision after a hearing by the Conduct Board on May 31, 2019. He was terminated for contravening the Code of Conduct of the *Royal Canadian Mounted Police Regulations*, SOR/2014-281. On September 6, 2019, he received a copy of the written decision.

[3] He is representing himself in this appeal.

[4] On July 2, 2019, Mr. Dhillon filed his Application for Judicial Review, challenging the decision of the Conduct Board dismissing him. His judicial review sought to have the decision of the RCMP declared unlawful, and to direct the RCMP to reinstate him. He did so even though he was waiting for a decision on the appeal he had filed through the RCMP internal recourse system.

[5] On September 25, 2019, he filed an appeal to the Office for the Coordination of Grievances and Appeals ["OCGA"] pursuant to section 45.11 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [the "*Act*"] and the standing orders. On October 18, 2019, he received confirmation of his appeal from the OCGA. Over the next few months, the process moved forward with written submissions and rebuttals. There were two extensions of time granted to the Respondent in the appeal.

[6] On August 17, 2020, the submissions phase of the process was completed.

[7] Meanwhile, the Respondent brought a Motion to Strike the Application for Judicial Review in the Federal Court due to the pleading being defective because:

a. The Application was premature due to non-exhaustion of adequate remedies available under the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 and its regulations, and the applicable Commissioner's Standing Orders; and
b. That no exception circumstances exist to warrant departure from the doctrine of exhaustion.

[8] On September 1, 2020, the Prothonotary struck the Judicial Review Application without leave to amend, because there was no possibility of success due to the fact that Mr. Dhillon had an adequate alternative remedy.

III. Issues

[9] The issues are:

A. Did the Prothonotary commit a palpable and overriding error when striking the Application for Judicial Review?
B. Did the Prothonotary commit a palpable and overriding error when awarding costs to the Respondent?

IV. Standard of Review

[10] The palpable and overriding error is the standard of review for appeals of a prothonotary for questions of fact and for questions of mixed fact and law (*Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at 65-66; *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 177 at para 6 [*Hospira* 2020]; *Housen v Nikolaisen*, 2002 SCC 33). Pure questions of law are reviewed on a correctness standard; however there are none present in this judicial review (*Hospira* 2020 at para 6).

[11] Justice Stratas said that "palpable" means an error that is obvious and that "overriding" means an error that affects the outcome of the case (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 62-65).

[12] Cost orders are also subject to palpable and overriding error (*Curtis v Canada (Canadian Human Rights Commission)*, 2020 FCA 149 at paras 11-12; *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at paras 41-42).

[13] Without this type of error, deference is to be given to the decision of the prothonotary.

V. Analysis

A. *Did the Prothonotary commit a palpable and overriding error when striking the Application for Judicial Review?*

[14] Mr. Dhillon's grounds are:

> 1) The Madam Prothonotary Mandy Aylen (Motion Judge) erred in law by not examining the adequacy of the RCMP Appeal Process or examine the Appellant-articulated exceptional circumstances in her assessment of prematurity;
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> 2) The Motion Judge erred in law by deviating from the long-established court principle that on a motion to strike, the contents of the application were to be taken as true;
>
> 3) The Motion Judge erred in fact as she misapprehended the machinations of the RCMP Appeal Process and as a result, came to a faulty decision as it pertains to the delays present in the Appellant's underlying RCMP Appeal; and
>
> 4) The Motion Judge erred in her discretion by awarding the Respondent an excessive and unreasonable cost award.

[15] I note that Mr. Dhillon did not pursue his second ground but that ground is appropriate for striking an application for no reasonable cause of action, not for striking for prematurity. For those reasons, I will not address it further.

[16] There was no disagreement before the Prothonotary or in this motion that there was an internal process of appeals available to Mr. Dhillon within the RCMP. That process was to appeal to the Conduct Board pursuant to section 45.11 of the *Act* and the standing orders. But what the parties do not agreed to is the Prothonotary's finding that the RCMP's internal process is both adequate and effective.

[17] It is trite law that all adequate alternative remedies must be exhausted before a judicial review will be entertained in the Federal Court (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-31).

[18] The test that the Prothonotary had to apply is set out in *JP Morgan Asset Management (Canada) Inc v Minister of National Revenue*, 2013 FCA 250 at paragraph 91 [*JP Morgan*]. The Federal Court of Appeal ["FCA"] ruled that the Court cannot strike unless it is certain that:

i. There is recourse elsewhere (now or later);

ii. The recourse is adequate and effective; and

iii. The circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto.

[19] In the reasons, the Prothonotary found that there was no disagreement between the parties that there was recourse elsewhere. On the second and third elements, she found that reinstatement falls within the range of remedies that may be ordered by the tribunal, and the delays alleged were already found in *Kohl v Canada (Attorney General)*, (T-1123-19) [*Kohl*], an unreported decision, to be reasonable.

[20] Mr. Dhillon submitted affidavits from other individuals' proceedings alleging long delays in the RCMP appeal process as evidence that the process is not an efficient remedy. In response, the Prothonotary found that she agreed with Justice Lafrenière in *Xanthopoulos v Canada (Attorney General)*, 2020 FC 401 [*Xanthopoulos*], that while other matters could have long waiting periods, Mr. Dhillon has not shown that **his** appeal has taken excessively long.

[21] As well, he submitted his own affidavit and she considered the specific timelines and concluded that “it had not been demonstrated that the recourse offered to the Applicant by the RCMP internal appeal has been or will be unduly delayed and thus rendered ineffective.”

[22] The Prothonotary determined that the process is moving forward towards a determination, and that “[s]ince the assignment of the case manager, the appeal has made significant progress”.

[23] She then addresses “exceptional circumstances” and that Mr. Dhillon relies on evidence which show a “deep-seated unfairness” in the process. But then she held that he has not identified any issues of unfairness in relation to his specific process, and that undue delay, which had been previously been addressed, was the only factor pointed to. She found the process to be effective and adequate.

[24] Concluding that the application was premature, she then struck the application because it was plain and obvious it had no chance of success.

[25] The Prothonotary ordered costs in the amount of $1,500, which was half of the requested amount by the Respondent; she declined to award costs on the motion for a confidentiality order (which was declined by the Court previously) or on the production of the certified tribunal record.

(1) Delay makes internal recourse system to be ineffective

[26] Mr. Dhillon noted that at the time of his initial submissions to this appeal, there has been a period of approximately 15.5 months delay and that does not make the alternative an adequate effective alternative. He argued that because of this that the Prothonotary erred when she struck his judicial review as being premature because it is not an effective process.

[27] Mr. Dhillon states that *Kohl* and *Xanthopoulos* should not be relied on because they were based on an "incomplete analysis". Specifically, he alleges that they did not properly follow *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paragraph 31 [*CBSA v CB Powell*], where the Court notes that exceptional circumstances includes when there is no effective remedy.

[28] *Kohl* erred, according to Mr. Dhillon, because it "appeared to emphasize the significance of the involvement of the case manager" who is not an adjudicator or decision maker. He further submitted that the reasons proffered by the Court in *Kohl* were bereft of any analysis considering that the voluminous stages of the RCMP Appeal Process phases may have been a contributing factor to excessive delays in the Appellant's RCMP appeal. Attempting to distinguish *Kohl*, Mr. Dhillon argued that in that decision there was only an assessment of an 8 month delay, rather than the 14 month delay (at the time) in the instant case. I note that the Court has not enumerated or attributed any of the periods of delay that Mr. Dhillon puts forward.

[29] Further, he alleges that there was no analysis of the impact of the delay on him. He points out that in *Boogaard v Attorney General of Canada*, 2013 FC 267 [*Boogaard*], the Federal Court said that an adequate remedy must be timely, in reference to a 17 month delay, and that in *Caruana v Attorney General of Canada*, 2006 FC 1355 [*Caruana*], a 8 month delay was found to be excessively slow. He argued that in those cases, one's livelihood was not immediately taken away where as in his case it was.

[30] I agree that there will be times when delay renders an administrative process unreasonably slow, and therefore an ineffective remedy.

[31] These are arguments that might be suitable for a judicial review on the reasonableness standard, and not one for reviewing the decision of a prothonotary. The delay in this case was not so outside of a range that it would render the decision obviously and fatally wrong. Also, the Prothonotary gave reasons why the specific delay in Mr. Dhillon's matter did not render the delay excessive; specifically that his matter was moving forward.

[32] Further, *Boogaard* was not about a dismissal, but about a grievance, and *Caruana* did not involve the RCMP in any way, but was about the grievance of a prisoner so dealt with the Correctional Service of Canada's grievance system. The Prothonotary was not required to explicitly distinguish these cases for her decision to be free of palpable and overriding errors.

[33] The Prothonotary considered the prior jurisprudence and the particular facts in those cases, but I do not find that the jurisprudence set specific timelines that would indicate whether a

process was adequate or effective. Each case is dealt with on their specific facts. The delay could be caused by either the appellant or the decision maker as well as a delay being outside of either party's control. An analysis of excessive delay does not hinge on the specific span of the delay, but a myriad of factors, which explains why there is such a range of different delays in the jurisprudence. That is why each case is determined on their own facts.

[34] While others may have encountered delays in the determination of their appeals, the focus of the Prothonotary's inquiry was the handling of Mr. Dhillon's appeal and whether it has been unduly delayed. The evidence before the Prothonotary was that, notwithstanding the COVID-19 pandemic, the appeal has been moving forward towards a determination. She found that since the assignment of the case manager, the appeal had made significant progress and should be ready to be sent to the RCMP External Review Committee ["ERC"]. The Prothonotary had no evidence before her to suggest that any undue delay will occur in the ERC's consideration of the appeal and for a final decision to thereafter be rendered. The Prothonotary considered all of this and did not find that it has been demonstrated that the recourse offered to Mr. Dhillon by the RCMP internal appeal has been or will be unduly delayed and thus rendered ineffective.

[35] In this case, the Prothonotary found that Mr. Dhillon's case was moving forward, and that warranted striking the claim. I do not find a palpable and overriding error.

(2) Misapprehension of the RCMP Appeal Process

[36] In his reply, Mr. Dhillon alleged that the Prothonotary "fused" the issues of a misapprehension of the machinations of the appeal process with the analysis on delay. I find that

the two arguments of Mr. Dhillon amount to the same argument: that the appeal process results in excessive delay rendering it ineffective. For that reasons, the arguments raised by Mr. Dhillon on the misapprehension of the process have mostly been addressed above but will be examined further below.

[37] Mr. Dhillon argues that the Prothonotary erred because she misapprehended the RCMP appeal process by relying on the assessment in *Kohl*, which he argues also misapprehends the RCMP Appeal Process.

[38] Mr. Dhillon effectively raised the issue of *stare decisis*, that is to say, whether or not a Prothonotary is bound by a decision of a judge of the Trial Division. Mr. Dhillon states that *Kohl* and *Xanthopoulos* should not be relied on because they were based on an "incomplete analysis". Specifically, he alleges that they did not properly follow *CBSA v CB Powell* at 31, where the Court notes that exceptional circumstances includes when there is no effective remedy. He goes on to cite *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at 33 [*Wilson*] where the Court notes that in some rare cases the rule of law is aroused in interlocutory decisions.

[39] *Kohl* erred, according to Mr. Dhillon, because it "appeared to emphasize the significance of the involvement of the case manager" who is not an adjudicator or decision maker. He alleges that that the reasons proffered by the Court in *Kohl* were bereft of any analysis considering that the voluminous stages of the RCMP Appeal Process phases may have been a contributing factor to excessive delays in the Appellant's RCMP appeal.

[40] The Court's decisions in previous matters are not the proper subject of this Court's review of the decision of a prothonotary. Those cases remain good law, have not been reversed by appeal, and reliance on previous decisions is the cornerstone of a common law legal system. The foundation of the rule of law is a consistency in the law which can only be achieved if there is a consistency in the decisions made, no matter what judge or other judicial official makes it:

> Where the decision cited as authority is one of a judge to whom an appeal could be made, a further consideration, namely practicality, applies. It would be most impractical to render a decision in the knowledge that it would be reversed on appeal. Therefore, without question, the decision of a judge of the Trial Division (to which an appeal may be made from the decision of a prothonotary), should, in all cases, be followed by a prothonotary.
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> *Flexi-Coil Ltd v Rite Way Manufacturing Ltd*, [1990] 1 FC 108 at para 2, 18 ACWS (3d) 167 (my emphasis)

[41] A prothonotary is bound by the doctrine of *stare decisis* and is bound by the decisions of the Federal Court. There is no reason to believe that the Prothonotary misunderstood the RCMP Appeal Process. Her reasons were detailed and well reasoned based on the information before her. The Prothonotary did not make an obvious and reversible error by relying on recently decided good law.

(3) Incompetent Representation of Joel Welch

[42] Mr. Dhillon submitted that evidence alleging incompetent representation by Sergeant Joel Welch was not considered by the prothonotary. This evidence was found in Exhibit "B10" in the affidavit of Andy Yuen Hong which was submitted in support of another matter (*Letnes v Canada*, T-642-19).

[43] The line of argumentation regarding incompetent representation by Sergeant Joel Welch was not relevant as it was submitted relating to other proceedings, and was not evidence of what happened in Mr. Dhillon's process. The Prothonotary did not have to do an analysis of that submission as it does not relate to the prematurity of the application and went to the merits of the application.

(4) Disclosure

[44] Mr. Dhillon argued that the rules of disclosure are not fair and should be expanded, and that the disclosure requirements should be in line with *Sheriff v Canada*, 2006 FCA 139 at paragraph 29. He cites *Emam v Commanding Officer of E Division*, 2020 RCAD 09 at paragraph 64 [*Emam*] and notes that "the tribunal has recognized that a conduct authority must disclose all evidence in her possession that may assist the subject member, even if the prosecution did not plan to adduce it" (*Emam* at para 65). Mr. Dhillon argued that at the time of his case, they were relying on the disclosure rules as set out in *May v Ferndale Institution*, 2005 SCC 82. He argues that he did not benefit from the new standard of disclosure adopted by the tribunal. He submitted that this withholding of records irreparably damages his position.

[45] Though Mr. Dhillon asserts a "deep-seated unfairness in the RCMP conduct process", particularly as it relates to disclosure, and the experience of various participants in the RCMP internal appeal process. He does not specifically say what this argument relates to. I would imagine it is directed to his submission that the process is not an effective remedy or it may relate to his argument addressed below that this is an exceptional case.

[46] Further, Mr. Dhillon's reliance on *Sheriff* is misguided. That case outlines an exception of the disclosure rules in *May* for licensing review hearings. It has no bearing on the availability of administrative remedies to Mr. Dhillon. Even if there is a parallel to be drawn, that is properly done on judicial review after a decision has been made at the final stage of the tribunal. The mere possibility does not warrant disturbing the Order of a Prothonotary given he has not pointed to any specifics related to disclosure that are affecting the effectiveness of the internal RCMP Appeal System.

(5) Exceptional Nature

[47] Mr. Dhillon relies on *Wilson* for the proposition that because of the immediate dismissal and loss of wages, and the difficulty in appealing (until there is a written decision), that this should be an exception where the Federal Court intervenes before the end of the administrative process. He alleges that the 3 month period when he was waiting for his written decision rendered the process unfair.

[48] The Prothonotary, in the decision at paragraph 19, writing on the exceptional nature of an exception to the prematurity doctrine, quoted *CB Powell Ltd v Canada (CBSA)*, 2010 FCA 61 at paragraph 33:

> 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…

[49] The Prothonotary looked at Mr. Dhillon's submissions regarding the RCMP's misuse of the appeal process and how it is alleged to be broken. She found that he had not pointed to any unfairness or lack of disclosure related to his own appeal and held there were no exceptional circumstances that would allow him to come to this Court before he exhausted his remedies.

[50] I note that the decision of the RCMP was made on May 31, 2019, and the judicial review was filed on July 2, 2019. While Mr. Dhillon could claim that he knew that there was a good possibility of delay for the appeal, the judicial review was not filed on those grounds, nor was just over a month in any way an excessive delay.

[51] The Prothonotary did not make a palpable and over riding error when determining that Mr. Dhillon has not made out that there are any exceptional circumstances in this case.

B. *Did the Prothonotary commit a palpable and overriding error when awarding costs to the Respondent?*

[52] Mr. Dhillon submits that the cost awards were excessive. In exercising her discretion the Prothonotary ordered costs in the amount of $1,500.00 against him.

[53] The Respondent sought costs in the amount of $3,000.00 for the motion that was before the Prothonotary as well as confidentiality and production motions. The Prothonotary declined to order costs related to the confidentiality order as none were ordered at the time it was determined. She also declined to award costs related to the production motion.

[54] A cost award which was half of what was sought and is within the range of similar cases cannot be seen to be a palpable and overriding error.

VI. Conclusion

[55] Deference is owed to the decision of the Prothonotary and is only reversed when a palpable and overriding error is committed. The Prothonotary used the proper test as set out in *JP Morgan*, and applied the test properly. Another decision maker may have come to a different conclusion regarding the effectiveness of the tribunal; however that is not the test and I find no error that was palpable and overriding.

[56] The motion is dismissed.

VII. Costs

[57] The Respondent will be awarded costs in the amount of $500.00 payable forthwith by the Applicant.

ORDER IN T-1071-19

THIS COURT ORDERS that:

1. The motion is dismissed;

2. Lump sum inclusive costs of $500.00 are awarded to the Respondent payable by the Applicant forthwith.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1071-19
STYLE OF CAUSE:	SUKHJIT SINGH DHILLON v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCVEIGH J.
DATED:	DECEMBER 18, 2020

WRITTEN REPRESENTATIONS BY:

Sukhjit Singh Dhillon	FOR THE APPLICANT, ON HIS OWN BEHALF
Cindy Ko	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT