

Federal Court



Cour fédérale

Date: 20211230

Docket: T-810-21

Citation: 2021 FC 1487

Ottawa, Ontario, December 30, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ELIZABETH BERNARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Elizabeth Bernard seeks judicial review of a refusal by the Interim Executive Director of the Canadian Judicial Council [CJC] to consider her complaint against a judge of the Federal Court of Appeal [FCA Judge]. The CJC found that Ms. Bernard's complaint did not raise an issue regarding the FCA Judge's conduct, but instead concerned a judicial decision for which recourse was available only before the courts.

[2] Ms. Bernard has been declared a vexatious litigant by the Federal Court of Appeal (*Bernard v Canada (Attorney General)*, 2019 FCA 144). As a result, she requires leave of that Court to institute or continue a proceeding (*Federal Courts Act*, RSC 1985, c F-7, s 40(3)).

[3] On March 12, 2020, Ms. Bernard sought leave to commence an application for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board [FPSLREB]. The FPSLREB had dismissed her complaint that her bargaining agent committed an unfair labour practice by denying her the right to vote in a collective agreement ratification process (*Bernard v Professional Institute of the Public Service of Canada*, 2020 FPSLREB 11).

[4] In a decision dated December 9, 2020, the FCA Judge refused Ms. Bernard leave to commence an application for judicial review (*Bernard v Canada (Professional Institute of the Public Service)*, 2020 FCA 211 [*Bernard*] at para 29). The FCA Judge noted that Ms. Bernard's supporting affidavit did not include a draft notice of application or a particularized description of the grounds and evidence in support of her application for judicial review. But of greater concern was that her proposed application for judicial review was doomed to fail (*Bernard* at paras 30-31).

[5] Ms. Bernard says that a draft application for judicial review was included as an exhibit to her affidavit, but the FCA Judge neglected to read it. This was the basis of her complaint to the CJC.

[6] The CJC has the expertise to distinguish between matters that constitute judicial decision-making, for which recourse is available only before the courts, and matters that threaten the integrity of the judiciary as a whole. The CJC's determination that Ms. Bernard's complaint did not warrant its consideration was reasonable, and consistent with prior jurisprudence. It is owed deference by this Court.

[7] The application for judicial review is therefore dismissed.

II. Decision under Review

[8] The Interim Executive Director of the CJC drew a distinction between judicial misconduct and alleged errors in a judge's decision:

The mandate of the Canadian Judicial Council is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations where a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

Council is not a court and has no authority to review a judicial decision and the judge's reasons to determine whether the judge rendered a decision that is congruent with the law and/or the evidence. The appropriate recourse lies before the courts, when allowed by the law.

[9] The Interim Executive Director concluded that Ms. Bernard’s complaint did not raise any issue of conduct on the part of the FCA Judge, and therefore did not warrant consideration by the CJC.

III. Issue

[10] The sole issue raised by this application for judicial review is whether the decision of the CJC not to consider Ms. Bernard’s complaint against the FCA Judge was reasonable.

IV. Analysis

[11] The decision of the CJC is subject to review by this Court against the standard of reasonableness. The Court will intervene only if “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100).

[12] The CJC is a creature of statute, and derives its mandate from Part II of the *Judges Act*, RSC 1985, c J-1. The objects and powers of the CJC are described in ss 60(1) and (2):

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Mission du Conseil

60 (1) Le Conseil a pour mission d’améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l’uniformité dans

Powers of Council

(2) In furtherance of its objects, the Council may

- (a) establish conferences of chief justices and associate chief justices;
- (b) establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination;
- (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
- (d) make the inquiries described in section 69.

l'administration de la justice devant ces tribunaux.

Pouvoirs

(2) Dans le cadre de sa mission, le Conseil a le pouvoir:

- a) d'organiser des conférences des juges en chef et juges en chef adjoints;
- b) d'organiser des colloques portant notamment sur des questions liées au droit relatif aux agressions sexuelles et au contexte social, lequel comprend le racisme et la discrimination systémiques, en vue de la formation continue des juges;
- c) de procéder aux enquêtes visées à l'article 63;
- d) de tenir les enquêtes visées à l'article 69.

[13] Pursuant to s 63(2) of the *Judges Act*, the CJC may “investigate any complaint or allegation made in respect of a judge of a superior court”. Following the completion of an investigation, the CJC may report its findings to the Minister of Justice and, in specified circumstances, recommend that a judge be removed from office (*Judges Act*, ss 65(1)-(2)):

Report of Council

65 (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Rapport du Conseil

65 (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.

Recommendation to Minister

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

Recommandation au ministre

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants:

- a) âge ou invalidité;
- b) manquement à l'honneur et à la dignité;
- c) manquement aux devoirs de sa charge;
- d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

[14] The CJC has established and published policies and procedures regarding investigations and inquiries, including the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, July 29, 2015 [*Review Procedures*]. The *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2015-203 and the *Review Procedures* prescribe a multi-stage process.

[15] At the first stage, the Executive Director of the CJC reviews the complaint and decides whether the matter warrants consideration. Early screening criteria are found in s 5 of the *Review*

Procedures. Pursuant to s 5(b) of the *Review Procedures*, complaints that do not involve conduct do not warrant consideration by the CJC.

[16] At the hearing of the application for judicial review, a question arose as to whether the CJC's investigation mandate is limited to conduct that could lead to a recommendation that the judge be removed from office. The parties were given an opportunity to make further written submissions regarding this point.

[17] According to the *Review Procedures*, if a complaint warrants consideration beyond the initial screening stage, the Executive Director refers the complaint to the Chairperson of the Judicial Conduct Committee for review. After giving the judge an opportunity to be heard, the Chairperson may provide the judge with an assessment and express concerns about a judge's conduct, despite dismissing the complaint. The Chairperson may also hold a matter in abeyance and recommend that the complaint be addressed by way of counselling or other remedial measures (*Review Procedures*, ss 8.2-8.4).

[18] On December 16, 2021, the government introduced Bill C-9, *An Act to Amend the Judges Act*, in the House of Commons. According to the summary of Bill C-9, which has not progressed beyond first reading:

This enactment amends the *Judges Act* to replace the process through which the conduct of federally appointed judges is reviewed by the Canadian Judicial Council. It establishes a new process for reviewing allegations of misconduct that are not serious enough to warrant a judge's removal from office and makes changes to the process by which recommendations regarding removal from office can be made to the Minister of Justice. [...]

[19] Ms. Bernard notes that the CJC did not reject her complaint because it could not lead to a recommendation that the FCA Judge be removed from office, or because it was trivial. Rather, the Interim Executive Director of the CJC determined that the complaint did not raise any issue of the FCA Judge's conduct.

[20] Ms. Bernard says that the Interim Executive Director misconstrued her complaint when he characterized it as directed towards the FCA Judge's alleged failure to consider her materials and arguments. Instead, she asserts that her complaint concerned the FCA Judge's failure to read her submissions. According to Ms. Bernard, a judge's failure to read a party's submissions on a motion that is to be decided in writing amounts to judicial misconduct, comparable to a judge falling asleep on the bench. She notes that s 40(5) of the *Federal Courts Act* precludes appeals from refusals to grant leave to vexatious litigants to instigate new proceedings, and so she has no recourse before the courts in this case.

[21] In *Singh v Canada (Attorney General)*, 2015 FC 93 [*Singh*], Justice Elizabeth Heneghan upheld a decision by the CJC to dismiss a complaint against several judges of the Ontario Superior Court of Justice and the Ontario Court of Appeal. The applicant in that case alleged that the judges had ignored binding jurisprudence, applied incorrect jurisprudence, ignored facts and submissions, engaged in case fixing and acted in a corrupt and biased manner (*Singh* at para 9). Justice Heneghan held that the CJC's mandate is limited to reviewing improper judicial conduct that affects the ability of judges to execute their duties as judges. It does not include a broad jurisdictional power to review the decisions and judgments of judges (*Singh* at para 51).

[22] In *Lochner v Canada (Attorney General)*, 2021 FC 692 [*Lochner*], Justice Catherine Kane similarly found that the CJC had reasonably refused to consider complaints that a judge's rulings and decisions were not made in accordance with the rule of law, the judge failed to follow precedents, the wrong legal test had been applied, and the evidence had not been properly dealt with (at para 101). Justice Kane observed at paragraph 100:

[...] judicial councils have the expertise to make the distinction between matters that constitute judicial decision-making – that can be addressed by an appeal – and matters that threaten “the integrity of the judiciary as a whole” – that cannot be addressed by an appeal. Deference is owed to the decisions of judicial councils, including the CJC.

[23] Like the applicants in *Singh* and *Lochner*, Ms. Bernard alleges that the FCA Judge ignored facts and submissions, and failed to deal properly with the evidence. The absence of an appeal procedure under s 40 of the *Federal Courts Act* does not transform the nature of Ms. Bernard's complaint from one respecting judicial decision-making to one of judicial misconduct.

[24] The CJC has the expertise to distinguish between matters that constitute judicial decision-making, for which recourse is available only before the courts, and matters that threaten the integrity of the judiciary as a whole. The CJC's determination that Ms. Bernard's complaint did not warrant its consideration was reasonable, and consistent with prior jurisprudence. It is owed deference by this Court.

V. Conclusion

[25] The application for judicial review is dismissed, with costs payable to the Respondent in the all-inclusive amount of \$500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed,
with costs payable to the Respondent in the all-inclusive amount of \$500.00.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-810-21

STYLE OF CAUSE: ELIZABETH BERNARD v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 29, 2021

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: DECEMBER 30, 2021

APPEARANCES:

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(on her own behalf)

FOR THE APPLICANT

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FOR THE RESPONDENT

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