Federal Court  Cour fédérale

Date: 20230825

Docket: T-1839-21

Citation: 2023 FC 1148

Ottawa, Ontario, August 25, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

KARSON MACKIE

Applicant

and

VIA RAIL CANADA INC.

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Karson Mackie, seeks an order pursuant to Rule 316 of the *Federal Courts Rules*, SOR/98-106, authorizing him to call 14 witnesses at the hearing of this application. In the application, Mr. Mackie seeks judicial review of a decision of the Canadian Human Rights Commission not to deal with his complaint against VIA Rail Canada Inc because a grievance procedure was reasonably available.

[2] For the reasons below, I am not satisfied there are “special circumstances” justifying Mr. Mackie’s request. The issues on this application are limited to whether the Commission fairly and reasonably determined that the subject matter of Mr. Mackie’s complaint was grievable. While Mr. Mackie asserts that the witnesses in question have information regarding the events underlying his claim, those events are only relevant to the application for judicial review as they relate to the Commission’s determination that the complaint is grievable. With limited exceptions, which do not apply here, an application for judicial review is heard and determined on the record that was before the tribunal. New evidence regarding the merits of the matter, whether in the form of affidavits or live witnesses, is not admissible. Mr. Mackie’s allegations that VIA Rail, and a number of the proposed witnesses, engaged in unethical, outlandish, egregious, and even criminal behaviour, do not render the witnesses’ evidence relevant or admissible for purposes of this application. The Court will not issue an order under Rule 316 to authorize irrelevant or inadmissible testimony.

[3] Mr. Mackie has not satisfied his onus to demonstrate that the evidence he proposes be heard through live witnesses is sufficiently necessary and relevant to the issues in the proceeding to meet the high standard of “special circumstances.” The motion is therefore dismissed. As VIA Rail has not requested costs, no costs are awarded.

[4] I note as a preliminary matter that Mr. Mackie filed this motion in April 2023. VIA Rail responded to the motion shortly thereafter. Unfortunately, Mr. Mackie’s motion was not put before the Court until August 2023, resulting in a delay in the disposition of the motion for which neither party is responsible.

II. Background to the Current Motion

A. *Mr. Mackie's human rights complaint*

[5] Mr. Mackie's complaint pertains to VIA Rail's treatment of his addiction disability, which he asserts amounted to discrimination remediable under the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. The allegations in his complaint include an incident in 2017 when he was required to drive a locomotive after admitting his substance abuse problem; the handling of his request for accommodation in 2019 after he had been in treatment; his suspension shortly after the request for accommodation; statements made by a supervisor said to be of a threatening nature; and several steps taken by VIA Rail in connection with his employment that are said to be coercive.

B. *The Commission's decision not to deal with the complaint*

[6] After receiving the complaint, the Commission wrote to the parties, raising the issue of whether a grievance or review procedure was available to deal with the matter. Under paragraph 41(1)(*a*) of the *CHRA*, the Commission is to deal with any complaint filed unless it appears that "the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available." The Commission gave notice it would be preparing a report with respect to the issue and invited the parties to make submissions.

[7] In response to this notice, Mr. Mackie alleged that VIA Rail did not have the "appropriate process, procedures, or adequate level of credibility or integrity to handle his complaint ensuring procedural fairness and impartiality." He claimed the only union representative in his jurisdiction was in a position of conflict because he was lifelong friends with the supervisor who threatened him, and had colluded with others at VIA Rail against another employee with an addiction disability. He also described communications with the General Chairman, Central Division, and alleged there was corruption in VIA Rail's review procedure involving the Ombudsman and Ethics Compliance Office. In essence, Mr. Mackie contended there was corruption between the union and management at VIA Rail, and that given the abuse and discrimination he had faced, he could not be expected to pursue remedies within the workplace.

[8] VIA Rail also responded to the notice, alleging the matter was grievable. It asserted that Mr. Mackie's union, Teamsters Canada Rail Conference, had assisted Mr. Mackie in the past and that there was no reason they would fail to do so in respect of his discrimination complaint. It set out provisions in the applicable collective agreement, noting that disputes were to be adjudicated by three arbitrators with the Canadian Railway Office of Arbitration [CROA], said to be an independent body.

[9] The Commission sent a second notice regarding the grievability issue in July 2021, pursuant to a new decision-making process. The notice gave the parties the opportunity to provide any new information not provided previously. Both parties again responded, reiterating their former positions and adding new information. In Mr. Mackie's case, this included an allegation that his local union representative had made an offensive, inappropriate, and

disparaging comment about his hometown, together with information regarding the mishandling of another issue by the General Chairman. In VIA Rail's case, it included recent examples of the union assisting Mr. Mackie.

[10] On October 29, 2021, the Commission rendered its decision. It decided not to deal with Mr. Mackie's complaint because a grievance procedure was available to deal with the issues raised, and the failure to exhaust that process was wholly attributable to Mr. Mackie.

C. *Mr. Mackie's application for judicial review*

[11] This application seeks judicial review of the Commission's October 29, 2021 decision, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. In his Notice of Application, Mr. Mackie purports to seek a variety of damages, as well as mandatory orders with respect to his employment at VIA Rail and VIA Rail's internal reporting system. Mr. Mackie alleges the Commission was "grossly negligent and careless" in its assessment of the matter, pointing out what he asserts to be errors in the Commission's decision.

[12] The parties have now filed their records. In August 2022, Mr. Mackie filed a Requisition for hearing. In October 2022, the Court rendered its decision with respect to VIA Rail's request to file a supplementary record: *Mackie v VIA Rail Canada Inc*, 2022 FC 1369, aff'g 2022 FC 871. In April 2023, Mr. Mackie filed this motion in writing, asking the Court to authorize witnesses to testify at the hearing of the application.

III. Analysis

A. *Principles*

(1) Rule 316

[13] The general rule is that an application under Part 5 of the *Federal Courts Rules*, including an application for judicial review, proceeds on a written record. Rule 316 provides that the Court may authorize a witness to testify "in special circumstances":

Testimony regarding issue of fact	**Témoignage sur des questions de fait**
316 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application.	**316** Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une demande.

[14] The parties cited a number of cases dealing with Rule 316 and/or Rule 371, which is the equivalent rule governing motions: *Holland v Canada (Attorney General),* 1999 CanLII 9168 (FC) at para 3; *Glaxo Canada Inc v Canada (Minister of National Health & Welfare),* 1987 CarswellNat 245 (FCTD) at paras 6–10; *Njonkou v Canada (Canada Revenue Agency),* 2006 FC 849 at paras 3–7; *Cyanamid Canada Inc v The Minister of National Health and Welfare*, 1992 CarswellNat 1342, 52 FTR 22 (TD), aff'd without comment (1992), 9 Admin LR (2d) 161 (CA); *Canadian Supplement Trademark Ltd v Petrillo*, 2010 FC 421 at paras 23–25; *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 970 at paras 20–32. To this list, the Court adds *Dunbar v Canada (Customs and Revenue Agency),* 2001 FCT 1320 at paras 3–4; *Tobique Indian Band v Canada*, 2009 FC 784 at paras 47–49; and

Lajeunesse v Canada (Attorney General), 2019 FC 1405 at paras 6, 15–19, cases which similarly set out and apply the relevant principles.

[15] From these cases, the following principles governing Rule 316 can be drawn:

- the onus is on the moving party to establish the existence of special circumstances justifying the requested order;
- what constitutes "special circumstances" will depend on the facts of the particular case, but the usual practice of conducting applications on the basis of documentary evidence will be departed from only in an "exceptional case" or the "clearest of circumstances";
- the proposed testimony must be relevant and admissible evidence that is not already in the record, and that is essential or necessary for the resolution of the application;
- obtaining the evidence by affidavit or cross-examination must be impossible or inadequate, and not simply less preferable; and
- contradictions in the documentary evidence, or a desire that the Court be able to assess the demeanour of a witness, do not in themselves justify an order.

[16] Mr. Mackie also refers to the Federal Court of Appeal's discussion of "exceptional circumstances" in *Wenham v Canada (Attorney General)*, 2021 FCA 208 at paras 36–37. That case related to Rule 334.39, pertaining to the awarding of costs on a motion for certification of a proceeding as a class proceeding. The difference in context is such that some caution is

warranted in adopting the Court of Appeal's conclusions. Nonetheless, I agree with Mr. Mackie that the Court of Appeal's discussion of the word "exceptional" as connoting "something quite remarkable, extraordinary or, if not rare, at least very far from common" appears consistent with the case law discussing Rule 316: *Wenham* at para 37.

(2) Evidence on an application for judicial review

[17] As with all evidence tendered on an application, evidence that a party seeks to call through a witness under Rule 316 must be relevant and admissible. On an application for judicial review, the scope of what is relevant and admissible is informed by the limited role of the Court in reviewing the decision of an administrative decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 16–20; *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7–9. The Court's task on judicial review is to assess whether the decision maker's decision was reasonable and fair, and not to re-decide the matter. As a result, the evidentiary record before this Court on judicial review is generally restricted to the evidentiary record that was before the Board: *Access Copyright* at para 19; *Sharma* at para 7. An applicant is not permitted to file new evidence before this Court on judicial review to supplement, improve, or correct the materials they filed before the administrative decision maker.

[18] There are limited exceptions to this general rule, in circumstances where additional evidence would not expand or interfere with the Court's role. This may include evidence regarding general background to assist the Court in understanding the issues; evidence regarding

procedural defects that cannot be found in the evidentiary record; or evidence that highlights the absence of evidence before the decision maker on an issue: *Access Copyright* at para 20.

B. *Applying the principles*

[19] Mr. Mackie seeks leave to call 14 witnesses at the hearing of the application: (a) a safety agent with the Transportation Safety Board; (b) a Transport Canada employee; (c) six current or former locomotive engineers with VIA Rail, including a union representative said to be in collusion with management; (d) the General Chairman, Central Division, of Teamsters Canada Rail Conference; and (e) five VIA Rail managers involved in his case in varying ways, including the Ethics Officer and the former President of the company. Mr. Mackie's written submissions describe the involvement of each in the matters at issue, which the Court understands to be the matters on which he wants them to testify.

[20] I am not satisfied that Mr. Mackie has met his onus to demonstrate that there are special circumstances justifying the testimony of these witnesses at the hearing of the matter. Much of the proposed evidence described is not relevant to the issues on this application. All of it is inadmissible. Mr. Mackie has therefore not demonstrated that the proposed testimony is essential or necessary to the outcome of the application.

[21] Mr. Mackie's request must be assessed and determined in the context of the matters at issue on the application. This is an application for judicial review of the Commission's decision not to deal with Mr. Mackie's complaint because Mr. Mackie had to exhaust grievance or review

procedures otherwise reasonably available. The sole issues on the application are whether the Commission's decision was substantively unreasonable and/or procedurally unfair.

[22] Importantly, the merits of Mr. Mackie's human rights complaint are not at issue on this application. Nor is this Court permitted to consider what decision the Commission might have reached if further or different evidence or submissions had been presented when it sought the parties' positions on the application of section 41 of the *CHRA*: *Access Copyright* at paras 18–19; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 125–128. Rather, the Court is to assess (a) whether the Commission fairly gave the parties notice of the case to meet and an opportunity to address that case, and (b) whether, in light of the record before it and the parties' submissions, the Commission reasonably concluded that Mr. Mackie could have pursued his complaint through the grievance and arbitration procedure in his collective agreement.

[23] Much of the testimony proposed by Mr. Mackie does not relate to either of these issues. It relates to the substance of Mr. Mackie's human rights complaint and, in some cases, to allegations against VIA Rail going beyond the substance of his complaint. As Mr. Mackie describes it, he wishes to call the evidence "[i]n order for the totality of the truth to be heard in its fullest spirit" with respect to the conduct of VIA Rail over the last six years. Such evidence is irrelevant to the specific issues on the application for judicial review and cannot justify an order under Rule 316. This is so regardless of the nature or seriousness of the allegations raised.

[24] Some of the proposed testimony may arguably relate to one or more of the factors considered by the Commission in assessing whether the grievance procedure was "reasonably available." These factors include whether the grievance decision maker is independent of the complainant and respondent; whether Mr. Mackie was responsible for not pursuing the grievance procedure; and whether the matter is a systemic complaint or one that is in the public interest. However, these factors go to the merits of the issue before the Commission and the decision it made. Evidence that speaks to such issues does not fall within an exception to the rule against new evidence, and is inadmissible on judicial review: *Access Copyright* at para 19; *Sharma* at paras 7–9.

[25] Mr. Mackie asserts that his wish is not to bring in any "new" evidence, but to have witnesses "expand on the evidence that has already been submitted," citing *Canadian Private Copying Collective v Fuzion Technology Corp*, 2005 FC 1557. In that case, Justice Hughes considered an applicant's request to convert its application into an action so it could adduce new evidence regarding the respondents' conduct. In declining the request, Justice Hughes noted that the *Federal Courts Rules* governing applications include rules "which do afford some opportunity to an applicant to expand upon its initial evidence [filed under Rules 306 and 307]," citing Rules 87 to 100, 312, 313, and 316 as examples: *Fuzion* at para 7.

[26] Contrary to Mr. Mackie's submission, *Fuzion* does not stand for the principle that an applicant on an application for judicial review is permitted to file evidence or call witnesses to expand on their initial evidence by means of Rule 316. Notably, *Fuzion* did not involve an application for judicial review, but an application brought under subsection 34(4) of the

Copyright Act, RSC 1985, c C-42. In such an application, there is no underlying decision under review, so different principles apply regarding admissible evidence. While Justice Hughes described the nature of the provisions generally, he was not addressing in any way the scope of permissible evidence on an application for judicial review. In any event, the Federal Court of Appeal's decisions in *Access Copyright* and *Sharma* constitute binding authority that preclude an applicant on judicial review from filing new evidence going to the merits of the decision.

[27] As the evidence that Mr. Mackie seeks to tender through witnesses is inadmissible, it cannot be said to be necessary or essential to the determination of the application. I am therefore unable to conclude there are special circumstances that warrant an order under Rule 316 authorizing the witnesses to testify at the hearing of the application for judicial review.

IV. Conclusion

[28] Mr. Mackie's motion is therefore dismissed. As VIA Rail has not sought costs, no costs are ordered. VIA Rail has asked that the Court issue a further order denying Mr. Mackie the right to present any additional evidence, including witness testimony. VIA Rail has presented no argument regarding the need or basis for such a further order.

ORDER IN T-1839-21

THIS COURT ORDERS that

1. The motion is dismissed, without costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1839-21
STYLE OF CAUSE:	KARSON MACKIE v VIA RAIL CANADA INC

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

ORDER AND REASONS:	MCHAFFIE J.
DATED:	AUGUST 25, 2023

WRITTEN REPRESENTATIONS BY:

Karson Mackie	ON HIS OWN BEHALF
André L. Baril Caroline-Ariane Bernier Jasmin Ethier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Montreal, Quebec	FOR THE RESPONDENT