Federal Court

Cour fédérale

Date: 20100408

Docket: T-1165-08

Citation: 2010 FC 372

Ottawa, Ontario, April 8, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

KATIE BARTAKOVIC AND
PUBLIC SERVICE ALLIANCE OF CANADA

Applicants

and

ATTORNEY GENERAL
OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] As a rule, this Court is not inclined to judicially review interlocutory decisions of federal tribunals. There are, of course, exceptions. Until a few days before the scheduled judicial review of a decision by the Occupational Health and Safety Tribunal Canada that it was institutionally independent, both parties intended to proceed on the merits. However, in light of the very recent decision of the Federal Court of Appeal in *Canada (Border Services Agency) v. C.B. Powell Ltd.*,

2010 FCA 61, the Attorney General queried whether it was appropriate to proceed. I have decided to dismiss the judicial review on the grounds that it is premature. Justice will be better served by a judicial review, if necessary, of the final decision of the Tribunal. As stated by Mr. Justice Stratas in *C.B. Powell,* at para. 32, judicial non-interference with ongoing administrative processes:

> […] [P]revents 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 the reviewing court have all of the administrative decision-maker's findings; these findings may be suffuse with expertise, legitimate policy judgments and valuable regulatory experience […]

[2] On August 31, 2005, almost five years ago now, Ms. Bartakovic, a customs inspector at the Rainbow Bridge, Niagara Falls, refused to work after receiving notice that two armed and dangerous individuals might attempt to cross the border at her workplace. She invoked Section 128 of the *Canada Labour Code* which entitles her to refuse to work if she had reasonable cause to believe that she would be in danger.

[3] The following day, a health and safety officer investigated and issued a "no danger" decision. She was directed back to work, and complied.

[4] However, with the assistance of her bargaining agent, the Public Service Alliance of Canada (PSAC), she appealed to the Canada Appeals Office on Occupational Health and Safety, now

known as the Occupational Health and Safety Tribunal Canada. I will refer to the Tribunal as the "Appeals Office". The appeal is *de novo*.

[5] Appointments to the Appeals Office are made by the Minister pursuant to Section 145.1 of the Code. A preliminary objection was raised concerning the institutional independence of the Office. The concern was that the Office was created and operated in such a way that a fair minded person, looking at the matter objectively, would be concerned that Ms. Bartakovic might not get a fair hearing. The objection raised matters of security of tenure, security of remuneration, administrative independence and *Charter* rights. Evidence was led as to actual practice before the Appeals Office and as to the history of Part II of the Code.

[6] This preliminary objection took on a life of its own. The first appeals officer had to recuse himself on grounds which had nothing to do with the merits of the preliminary objection. Then at the outset of the proceedings before the new appeals officer, Pierre Guenette, the Director of the Appeals Office sought and was granted intervener status, but then resiled therefrom. Thereafter, a great deal of evidence was led, and the hearing was reopened to admit additional evidence which had been obtained under the *Access to Information Act*.

[7] Mr. Guenette reserved his decision for 14 months. In June 2008, he decided that the Appeals Office was sufficiently independent. Ms. Bartakovic and the PSAC filed an application for judicial review in July 2008. The hearing thereof, based on a record in excess of 4,000 pages, was scheduled to be heard on March 30, 2010.

[8] A few days before the scheduled hearing, counsel for the Attorney General wrote to the Registry, with copy to counsel for the Applicants, to bring to the Court's attention the decision of the Federal Court of Appeal in *C.B. Powell*, above. Until that decision was rendered, the Attorney General was more than content to have this Court review the interlocutory decision that the Appeals Office was institutionally independent. Although the facts in *C.B. Powell* are very much different, both parties in that case were also content to have the Federal Court rule on an issue by way of declaration, rather than to pursue the administrative process set out in the *Customs Act*.

[9] I deemed that the Attorney General was moving for an order to either stay or dismiss the application for judicial review on the grounds that it is premature. Since it was agreed that that motion and the judicial review could not both be heard in the one day set aside, the application for judicial review was adjourned to a later date or until it was ordered dismissed, as the case might be.

[10] As well, the Court also expressed concern that the application for judicial review lacked sufficient factual context. If Ms. Bartakovic wrote down why she considered she was in danger if she worked that August day, it was not to be found in the record. If the health and safety officer, who decided the next day that there was no danger, wrote down his reasons why he had come to that conclusion, they were not to be found in the record as well. I was advised that the practice is that the appeals officer would call the complainant, in this case Ms. Bartakovic, and the health and safety officers as witnesses, that is to say if there are still alive and available.

IS THE APPLICATION PREMATURE?

[11] The Attorney General primarily rested his case on two decisions, the recent decision of the Federal Court of Appeal in *C.B. Powell*, above, and the decision of Mr. Justice Martineau in *Sanofi Pasteur Ltd. v. Attorney General of Canada*, 2008 FC 286, 327 F.T.R. 291. These cases, and many others, emphasize the normal rule that parties should only go to Court after exhausting all the remedial recourses available in the administrative process. Nevertheless the Court, in its discretion, may entertain an application for judicial review of an interlocutory decision if "exceptional circumstances" exist. One such circumstance would be an allegation of systemic bias, as indeed in this case the applicants take the position that natural justice cannot be seen to be done because the structure of the Appeals Office does not give it institutional independence.

[12] However, even if exceptional circumstances exist, the Court, in its discretion judicially exercised, must take into account a number of other factors in deciding whether or not to dismiss or stay on the grounds that the application for judicial review is premature.

[13] *C.B. Powell* was a somewhat unusual case which dealt with the assessment of duties under the *Customs Act* and the recourses available to an importer faced with an unfavourable decision. One step was to ask the President of the Canada Border Services Agency to rule on the matter. He declined on the grounds that he lacked jurisdiction as there had been no previous decision on the point in dispute to appeal. The next step was to appeal a decision of the President to the Canadian International Trade Tribunal (CITT), and from there on a point of law to the Federal Court of Appeal. However, basing itself on past history in these matters, C.B. Powell sought a declaration

from the Federal Court as to whether the president had rendered a "decision" which could be appealed to the CITT. This Court, indeed myself, declared that there was a right of appeal to the CITT as the president's "non-decision" was a "decision".

[14] In appeal, Mr. Justice Stratas, speaking for the Court, stated at para. 4 that:

> Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.

[15] He added at para. 33, with citations, that:

> 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 […]

[16] In *Sanofi Pasteur*, above, Mr. Justice Martineau was faced with the judicial review of an interlocutory decision which dismissed a motion that the Patented Medicine Prices Review Board's counsel be removed as that firm also acted for Sanofi-Pasteur's competitor.

[17] Mr. Justice Martineau dismissed the application as being premature. More particularly, he did not find that the allegation of conflict of interest led to special circumstances which warranted a judicial review of the interlocutory decision.

[18] He relied on a number of cases including the decision of Mr. Justice Evans, as he then was, in *Air Canada v. Lorenz*, [2000] 1 F.C. 494, for the proposition that an allegation of perceived bias does not in and of itself justify judicial review before the tribunal has rendered its final decision. In

Sanofi Pasteur, the applicant had preserved its position by raising its bias concern early and so its right to raise that point on judicial review, should an unfavourable decision be rendered by the tribunal, was preserved. The same holds true in this case.

[19] Counsel for Ms. Bartakovic and the PSAC pointed out that at para. 49 of *Sanofi Pasteur*, Mr. Justice Martineau said that the case before him was not one of systemic bias going to the jurisdiction of the board, while indeed is the case before me.

[20] Counsel for Ms. Bartakovic emphasises that the issues raised in this judicial review go to the very structure of the Appeals Office and so, unlike the situation in *Sanofi Pasteur*, are systemic in nature. Similar allegations of institutional independence were raised with respect to the Canadian Human Rights Tribunal and the Canadian Human Rights Commission and worked themselves all the way up to the Supreme Court on judicial review of interlocutory orders (*Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 S.C.R. 884). However that was the only case of a similar nature which came to counsel's mind. Other cases which deal with institutional independence such as *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, were heard as part and parcel of the entire case on its merits.

[21] Indeed the *Bell* case proves the point. The Supreme Court pointed out that it was considering an appeal from a decision of the Federal Court of Appeal, 13 years after the filing of the original complaints, which had not yet been heard on the merits. The Supreme Court held that the

tribunal was sufficiently and institutionally independent and impartial. When all is said and done, the judicial review of the interlocutory decisions was a colossal waste of time.

[22] The parties seem to have lost sight of the fact that the issue is whether a fair-minded person, having thought the matter through, would be concerned that the Appeals Office was unable to give Ms. Bartakovic a fair hearing *de novo*. While the parties agree that Ms. Bartakovic's concern was that she did not have adequate protection, a codeword for the right to bear arms, the Court, as well as the Appeals Office, has absolutely no information as to why the health and safety officer decided she was not in danger. We are left to speculate. Was it because the information she had that two armed and dangerous individuals might attempt to cross the border at her work station was too flimsy to be relied upon, or was he of the view that sufficient protection was already in place?

[23] Another case which illustrates my point is *Martin v. Canada (Attorney General)*, 2005 FCA 156, [2005] 4 F.C.R. 637, a review by the Federal Court of Appeal of a decision of an Appeals Officer under the *Canada Labour Code* who concluded that there was no evidence that a situation of "danger" existed which would justify supplying wardens in National Parks with side arms. No allegations of institutional insufficiency were alleged in that case. However the Court found that the Appeals Officer's decision, based on the evidence before him, was patently unreasonable. The decision was set aside and the matter was remitted to the Appeals Office for redetermination, thus giving rise to further delays.

[24] For these reasons, I shall dismiss the application for judicial review of the interlocutory decision of Appeals Officer Guenette on the grounds that it is premature. In the circumstances, there shall be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review of the interlocutory decision of Appeals Officer Guenette is dismissed on the grounds that it is premature.
2. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Katie Bartakovic and Public Service Alliance of Canada v. Attorney General of Canada
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