Federal Court of Appeal | Cour d'appel fédérale

Date: 20211015

Docket: A-272-20

Citation: 2021 FCA 202

CORAM: **WEBB J.A.**
GLEASON J.A.
MONAGHAN J.A.

BETWEEN:

MURLIDHAR GUPTA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry on October 12, 2021.

Judgment delivered at Ottawa, Ontario, on October 15, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the judgment of the Federal Court in *Gupta v. Canada (Attorney General)*, 2020 FC 952 in which the Federal Court dismissed the appellant's application for judicial review of the employer's decision to adopt an administrative investigation report, with the result that his request for a retroactive promotion was denied. The Federal Court premised its decision on the fact that the appellant had not exhausted the alternate

remedies available to him, principally, the grievance procedure under s. 208 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the FPSLRA).

[2] It was and is common ground between the parties that the appellant could have filed a grievance under s. 208 of the FPSLRA, contesting the employer's decision. The appellant did not do so prior to filing his application for judicial review. The parties also agree that such grievance, had it been filed, could not have been referred to adjudication under s. 209 of the FPSLRA.

[3] The Federal Court's decision is a discretionary one. Accordingly, this Court may interfere with its decision only if the Federal Court erred in law or made a palpable and overriding error in its consideration of the factors relevant to the exercise of its discretion: *Canada v. Greenwood*, 2021 FCA 186, at paras. 119-120; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, at paras. 28 and 71-72; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246, at paras. 18-19.

[4] The parties concur that the Federal Court did not err in law and thus the sole issue for determination is whether that Court made a palpable and overriding error in its consideration of the factors relevant to the exercise of its discretion.

[5] The appellant submits that the Federal Court so erred as it failed to consider the inadequacy of the grievance procedure in light of the particular circumstances of the instant case. The appellant more specifically says that the Federal Court was required to consider whether the

grievance procedure provided him a suitable and appropriate remedy in accordance with the principles set out in paragraphs 43-45 of *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 [*Strickland*]. He asserts that the grievance procedure could not do so in light of the lengthy dispute over his entitlement to a promotion and what he characterizes as the employer's intransigence on the issue, both of which he says establish that the employer was predisposed to decide against him. In his written materials before this Court and his arguments before the Federal Court, the appellant also submitted that the violation of his procedural fairness rights by the investigator could not be remedied through the grievance procedure, providing an additional reason why such procedure was inadequate.

[6] In support of the final point, the appellant relies on the decision of the Federal Court in *Chickoski v. Canada (Attorney General)*, 2016 FC 1043, 2016 CarswellNat 10936 [*Chickoski*], which he submits stands for the principle that the grievance procedure is incapable of remedying procedural fairness violations where a grievance is not adjudicable under s. 209 of the FPSLRA. With respect, I disagree. *Chickoski* stands for no such thing but instead confirms that the Federal Court has jurisdiction to hear a judicial review application from a final level decision in the grievance procedure where the grievance is not referable to adjudication under s. 209 of the FPSLRA and an applicant alleges that his procedural fairness rights have been violated in the grievance procedure. *Chickoski* has no application to the case at bar as the appellant filed no grievance.

[7] Rather, the principles governing whether the Federal Court ought to have deferred to the grievance procedure are set out in *Canada (Border Services Agency) v. C.B. Powell Ltd*,

2010 FCA 61, [2010] F.C.J. No. 274 [*C.B. Powell*]. It holds that a party may not commence an application for judicial review prior to exhausting alternate administrative remedies – like the grievance procedure – unless exceptional circumstances exist. In addition, as noted by this Court in paragraph 33 of *C.B. Powell*, the threshold for exceptionality is high and typically does not include denials of procedural fairness committed prior to the final administrative decision. (See also, to similar effect, *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561, (1979), 96 D.L.R. (3d) 14, at pp. 584-585, and *Nosistel v. Canada (Attorney General),* 2018 FC 618, 2018 CarswellNat 10225 [*Nosistel*], at para. 41, upon which the Federal Court relied in the instant case).

[8] These principles apply where a breach of procedural fairness is alleged to have occurred in an investigation that leads to a managerial decision that may be grieved (see, for example, *Nosistel* at paras. 41-44 and *McCarthy v. Canada (Attorney General)*, 2020 FC 930 at para. 35).

[9] Contrary to what the appellant asserts, the Federal Court faithfully applied these principles in its Reasons and cited at length from *C.B. Powell*. The Federal Court's review of the facts demonstrates that it was aware of the relevant factual backdrop, including the period in respect of which a remedy was sought and the positions taken by the employer. While the Federal Court did not comment on either point in the reasoning section of its Reasons, it appears from the Federal Court's Reasons that the focus of the appellant's arguments before that Court was the incorrect assertion premised on *Chickoski*, discussed above.

[10] I do not believe that its choice to decline to more fully discuss delay or the alleged employer intransigence requires intervention by this Court as the Federal Court did not commit a palpable and overriding error in determining that the circumstances were not sufficiently exceptional to warrant its intervention. As noted by the majority at paragraph 39 in *Strickland*, it is not the role of an appellate court, sitting in appeal from a discretionary decision like this one, to substitute its views for those of the Court below.

[11] As concerns delay, it was open to the Federal Court to have declined to hear the case despite the passage of time. In addition, the cases the appellant relied on in his oral submissions before this Court involved lengthier delays than in this case: over ten years in *Almrei v. Canada (Citizenship and Immigration),* 2014 FC 1002, 466 F.T.R. 159 and over five years in *Boogaard v. Canada (Attorney General),* 2014 FC 1113, [2014] F.C.J. No. 1162 , (reversed on appeal on other grounds, *Canada (Attorney General) v. Boogaard,* 2015 FCA 150, 474 N.R. 121 ,87 Admin L.R. (5th) 175, leave ref'd 2016 CanLII 18911 (S.C.C.)). Here, by virtue of the settlement agreement, the relevant period ran between the date of that agreement and the date of the employer's decision – a period of approximately two years – which is not inordinately long in light of the need for an investigation and detailed nature of the appellant's submissions to the investigator.

[12] I also note parenthetically that the passage of time has now become even less relevant because the appellant has recently been awarded the promotion he sought (although the issue of back pay remains outstanding).

[13] As concerns the alleged intransigence of the employer, the same may be said of virtually any situation where an employer makes a decision that an employee disagrees with. An employer's unwillingness to concede to an employee's claim is not a sufficient basis for the Federal Court to circumvent the grievance procedure and discard the principles set out by the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 regarding the exclusivity of the grievance process under s. 208 of the FPSLRA. The presence of the privative clause in s. 214 of the FPSLRA indicates that it is Parliament's intent that workplace disputes, like those of the appellant, be decided through the grievance procedure and that decisions made in that procedure be afforded deference by the Federal Court.

[14] There was accordingly ample basis for the Federal Court to have concluded that the circumstances of the case at bar were not so exceptional as to justify its intervention.

[15] There is one additional point I wish to make. Because it appeared from some of the discussion during the hearing that the appellant may have filed or might file a grievance to obtain the back pay he alleges he is owed, I underscore that nothing in the present decision should be understood as in any way impacting his ability to pursue such a grievance.

[16] For the foregoing reasons, I would dismiss this appeal, with costs.

"Mary J.L. Gleason"
J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
K.A. Siobhan Monaghan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-272-20
STYLE OF CAUSE:	MURLIDHAR GUPTA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	OCTOBER 12, 2021
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	WEBB J.A. MONAGHAN J.A.
DATED:	OCTOBER 15, 2021

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