Federal Court  Cour fédérale

Date: 20160219

Docket: 16-T-6

Citation: 2016 FC 227

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 19, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is seeking to contest by judicial review the decision made by Employment and Social Development Canada (the Department), dated September 30, 2015, which removed his application from an external appointment process because he did not meet one of the essential qualifications, reliability, for the position to be staffed. He is also seeking to contest the subsequent decision by the Public Service Commission of Canada (the PSC), dated

December 15, 2015, not to conduct an investigation following his complaint to the PSC relating to said appointment process.

[2] To do so, he submitted a request to the Court for, first, authorization pursuant to rule 302 of the *Federal Courts Rules*, SOR/98-106 (the Rules), to contest these two decisions under one judicial review application and, second, to be relieved of his failure to produce said application within the time limitation set out in section 18.1 of the *Federal Courts Act*, R.S.C. (1985), chapter F-7.

[3] The respondent does not oppose extending the time limitation for submitting the application for judicial review provided that it concerns only the PSC's decision, the only one it considers eligible for judicial review in this case.

[4] The main question to be resolved in this case is to determine whether the applicant may contest the decision of both the Department and the PSC in one application for judicial review. If the answer to this question is yes, it will be necessary to determine whether the application for judicial review, insofar as it contests the Department's decision, should be dismissed because it was submitted late. If the answer is no, the request will be partially allowed, with the applicant being authorized to submit his application for judicial review after the time limitation concerning the PSC's decision.

I. Application under rule 302

[5] Rule 302 stipulates that "unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought." In other words, this means that an application for judicial review should not in principle be used to contest more than one decision.

[6] The Court usually will make an exception to this rule when there is a connection between the decisions the applicant seeks to contest under one application for judicial review. Generally, that connection will result from the fact that the decisions concern the same parties and arise from the same facts and decision-maker, i.e., when they are part of a factual and decision-making continuum (Bernard Letarte et al, *Recours et procédure devant les Cours fédérales*, Montréal, LexisNexis, 2013, pages 363 to 368).

[7] The Court has also made an exception to the principle established under rule 302 when this continuum involves more than one decision-maker. However, those decisions have in common that the decision-makers in question are, in terms of making decisions, hierarchically at the same level and that the decisions in question are not subject to statutory remedy or, if they are, that the remedy has been exhausted. This was the case namely for *Council of the Innu of Ekuanitshit v. Canada (Fisheries and Oceans)*, 2015 FC 1298 and *Bellegarde v. Poitras*, 2009 FC 968, 352 FTR 290, cited by the applicant in support of his claims.

[8] However, in this case, the situation is completely different in that the PSC's decision results from exercising the investigative power granted under section 66 of the *Public Service Employment Act*, S.C. 2003, chapter 22 (the Act) with regard to the Department's decision. This situation includes, in the assessment of the applicant's request, considerations related to the doctrine of exhaustion stipulating that judicial review should be available only when the administrative process has finished or when the administrative process affords no effective remedy (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, paragraph 31, [2011] 2 FCR 332 [C.B. Powell Limited]).

[9] That doctrine, related to the principle of finality of the administrative decision-making process, has two consequences. First, the Court can rule as inadmissible an application for judicial review against a decision from an administrative decision-maker subject to internal remedy that has not been exhausted. This is what my colleague, Justice Sean Harrington, did in a case initiated by Mr. Lessard-Gauvin where he sought, as in this case, to contest through judicial review the decision by a federal department to eliminate him from an external appointment process when the PSC had not yet completed the investigation initiated under section 66 of the Act (*Lessard-Gauvin v. Attorney General of Canada*, Docket T-641-15; July 20, 2015).

[10] Second, once the administrative process has been exhausted, it is the final determination that is reviewable in Court and not the initial decision, or, if applicable, the interim decision(s). In my opinion, this is also evident in the ruling by Justice Harrington, who, after noting that the PSC had made its decision after the applicant had submitted his application for judicial review, declared that the application was inadmissible because it did not concern the PSC's decision.

This was also the position the Court assumed, even more explicitly, in *Pieters v. Canada (Attorney General)*, 2004 FC 342, 248 FTR 222 [*Pieters*], *Unrau v. Canada (Attorney General)*, [2000] FCJ No. 1434 [*Unrau*], and *Chief Gayle Strikes With a Gun v. Piikani First Nation*, 2014 FC 908, 464 FTR 178 [*Piikani First Nation*], in which it was clearly ruled that when remedy exists at a higher administrative level, the Court will consider only the decision from that higher level.

[11] With respect, I find this position to be fully consistent with the findings in the aforementioned *C.B. Powell Limited*, a case in which the Federal Court of Appeal cited the fundamentals of the doctrine of exhaustion of administrative remedies and highlighted its importance and the very rare exceptions. It is appropriate to cite the relevant excerpts from that decision here:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.
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> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation

or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

…

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. 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: see *Harelkin*, supra; *Okwuobi*, supra at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[12] In paragraph 32 of its ruling, the Federal Court of Appeal more specifically substantiates the considerations that, in my opinion, support the approach taken in the aforementioned *Pieters*, *Unrau* and *Piikani First Nation* cases, that is: unwanted fragmentation of the administrative and legal processes; costs and delays incurred as a result of this fragmentation; waste of judicial resources when the applicant may succeed at the end of the administrative process; the advantage for the Court of having all of the administrative decision-maker's findings available because of its specialized knowledge and regulatory experience; and the respect courts must demonstrate toward administrative decision-makers. That paragraph reads as follows:

> [32] This prevents 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: see, e.g., Consolidated Maybrun, supra at paragraph 38; Greater Moncton International Airport Authority v. Public Service Alliance of Canada, 2008 FCA 68 at paragraph1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C. S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[13] What I consider necessary to keep in mind from the *C.B. Powell Limited* case is that it is contradictory, absent extraordinary circumstances, to admit the judicial review of both the decision of the final administrative level and the decision on which that decision-making

authority had to rule. In my opinion, allowing that "would inject an alien element into Parliament's design" (*C.B. Powell Limited*, at paragraph 28). I consider this to be, at the very least, a relevant consideration in the exercise of discretion granted to the Court under rule 302.

[14] The applicant is essentially arguing that section 66 of the Act does not grant him "remedy" in the sense of the doctrine of exhaustion. As a result, he is pleading that the PSC is not a "court" and that the power vested in it under section 66 is purely discretionary. The applicant contends that only the right to appeal could provide him effective remedy, which is not the case in this instance.

[15] It is not how administrative remedy is described by Parliament that is important in determining what constitutes adequate or effective remedy; rather, it is what the decision-maker has the power to do, namely with regard to the relief that may be granted. This is notably what is demonstrated in the excerpt from Professor Denis Lemieux's work, *Le contrôle judiciaire de l'action gouvernementale*, Wolters Kluwer, 1981 (looseleaf updated in March 2015) cited by the applicant at the hearing, and in which Professor Lemieux writes, on page 1139-2, that when an organization [TRANSLATION] "has power under a particular statute, by order or otherwise, to remedy the situation, that order will constitute adequate remedy against extraordinary remedy."

[16] Section 66 of the Act grants the PSC the power to revoke or not make the appointment, as applicable, or to take corrective measures it deems necessary, when it is convinced that the appointment or proposed appointment of a candidate to a position in the public service was not based on merit or that there was an error, omission or improper conduct which affected the

selection of the person appointed or proposed for appointment. This remedial authority is extensive. It is at the very least sufficient for the applicant to hope, to paraphrase *C.B. Powell Limited*, to succeed at the end of the administrative process.

[17] It must be kept in mind that the PSC is an independent government agency (*Samatar v. Canada (Attorney General)*, 2012 FC 1263, at paragraph 25, 420 FTR 182 [*Samatar*]). It reports its activities directly to Parliament (section 23 of the Act). Its commissioners are appointed by commission under the Great Seal of Canada following approval by resolution of the Senate and House of Commons and are removable only on the Address of both Houses of Parliament (section 4 of the Act).

[18] The primary mandate of the Commission is to appoint, or provide for the appointment of, persons to or from within the public service in accordance with the Act and to conduct investigations and audits into how general administrators exercise the appointment authority granted by the Commission (section 11 of the Act). The PSC must namely ensure that appointments to the federal public service are made in accordance with the two cardinal principles of the staffing program instituted by the Act: merit and freedom from political influence. In addition to the exercise of its jurisdiction, the PSC has extensive regulatory powers (section 22 of the Act) and, for the purposes of the investigations and audits it conducts, the powers of a commissioner appointed pursuant to Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11 (sections 18 and 70), which are considered as quasi-judicial powers (*Samatar*, aff'd. at paragraph 104).

[19] The PSC also has, pursuant to sections 66 to 73 of the Act, plenary power that is independent from any investigation and sanction in order to ensure that external and internal appointments to the federal public service are made on the sole basis of merit and are free from any political influence. In that sense, this power is an "important supervisory tool that helps manage the staffing system and ensure the impartiality of the public service" (*Samatar*, aff'd. at paragraph 98).

[20] In my opinion, the powers vested in the PSC under section 66 of the Act present the characteristics of adequate remedy for any person who contends that an appointment or proposed appointment resulting from any external appointment process was not based on merit or that there has been an error, omission or improper conduct which affected the selection of the person appointed or proposed for appointment. I am also of the opinion that the PSC acts as a "court" in the very broad sense of the term in administrative law, a generic term that designates the multi-faceted profile of administrative decision-makers. A review of the Court's jurisprudence on PSC decisions is convincing in this regard: **(***Samatar*, at paragraphs 25, 185; *Challal v. Canada (Attorney General)*, 2009 FC 1251,at paragraph 25; *St-Amour v. Canada (Attorney General)*, 2014 FC 103, at paragraphs 22, 38, 40; *MacAdam v. Canada (Attorney General)*, 2014 FC 443, at paragraph 51; *McAuliffe v. Canada (Attorney General)*, 128 FTR 39, at paragraphs 10, 69 ACWS (3d) 482; *Shakov v. Canada (Attorney General)*, 2015 FC 1416, at paragraph 9; *Mabrouk v. Canada (Public Service Commission)*, 2014 FC 166, at paragraphs 59, 60).

[21] It is true that section 66 of the Act, a jurisdiction-granting provision, confers discretionary power on the PSC. However, insofar as the applicant claims that the remedy set out in section 66 does not constitute an effective remedy because the exercise of the powers conferred in that section rely on the goodwill of the PSC, as if it could decide, completely arbitrarily, not to exercise them, the applicant is mistaken. No discretionary power granted by the law is absolute, and all such powers are subject to the rule of law, the legislative framework from which it originates and the control of the courts (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at page 140; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 53).

[22] The applicant has asked the Court, on the basis of rules 3 and 55 of the Rules, to be flexible in its application of rule 302. However, recourse to rules 3 and 55 does not override a fundamental rule, such as the doctrine of exhaustion of remedies, which relies mainly, as we have seen, on concerns related to the optimal use of legal and administrative resources. The applicant feels that a flexible approach is appropriate, especially given the decision *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, in which the Supreme Court of Canada essentially ruled that a fair and just process is illusory unless it is also accessible — proportionate, timely and affordable. That decision is of little relevance to the applicant, given that it was made in a very different procedural context—the power to give preference to summary judgment over a trial—and that the judge is calling into question the interpretation and application of rules of procedure other than the Rules. I will reiterate that the proceedings sought by the applicant against the two decisions in this case are, as set out in section 18.4 of the *Federal Courts Act*, summary proceedings. The concerns examined by the Supreme Court in the *Hryniak* decision are

therefore completely different from those raised in the applicant's request. Regardless, the Supreme Court certainly did not repudiate in that judgment its extensive jurisprudence on the doctrine of exhaustion of remedies in administrative law.

[23] Lastly, the applicant did not demonstrate to me how being unable to contest the decision of both the Department and the PSC simultaneously was related to the *Canadian Bill of Rights*, S.C. 1960, chapter 44, or contravened in such a way as to justify Court intervention, the *International Covenant on Civil and Political Rights* or the *American Declaration of the Rights and Duties of Man*. The applicant is not faced with a difficulty in accessing the courts. The issue here is rather to determine whether that access must comply with the decision-making structure established by Parliament under the Act.

[24] I therefore find that the only decision the applicant is authorized to contest in this case is the PSC's decision, and that the part of his request based on rule 302 must be rejected.

II. Extension of the time limitation

[25] Given my finding that only the PSC's decision may be contested in this case, the request to have the time limitation extended for the Department's decision is no longer applicable. Moreover, because the respondent does not oppose extending the time limitation the applicant had to submit his application for judicial review of the PSC's decision, and because I am satisfied that an extension is justified under the current circumstances, it is appropriate to grant that aspect of the applicant's request.

[26] However, the remainder of the applicant's request is rejected. Because the applicant has essentially been unsuccessful, I see no reason not to follow the rule stipulating that costs be awarded on the basis of the outcome.

JUDGMENT

THE COURT RULES that:

1. The time limitation for submitting the application for judicial review of the Public Service Commission's decision, dated December 15, 2015, be extended;
2. The rest of the request be rejected, with costs against the applicant.

«René LeBlanc»

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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