Federal Court Cour fédérale

Date: 20190529

Docket: T-101-19

Citation: 2019 FC 757

St. John's, Newfoundland and Labrador, May 29, 2019

PRESENT: Madam Justice Heneghan

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

NORM MURRAY AND CANADIAN HUMAN RIGHTS COMMISSION

Respondents

ORDER AND REASONS

[1] By a Notice of Application dated January 11, 2019, the Attorney General of Canada (the "Attorney General") seeks judicial review of the decision of Mr. Ronald Sydney Williams, sitting as a Tribunal (the "Tribunal"), pursuant to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) (the "Act"). In that decision, made on November 29, 2018, the Tribunal decided that references to section 7 of the Act shall be struck from paragraphs 1 and 28 of Mr. Norm

Murray's (the "Respondent") Statement of Particulars. It also denied the Immigration and Refugee Board's request for particulars on the basis that the request is premature.

[2] By notice of motion in writing dated March 11, 2019, the Respondent seeks an Order to strike out the application for judicial review on the grounds that review of an interlocutory decision is premature and has no chance of success.

[3] The Canadian Human Rights Commission (the "Commission"), the second Respondent, consents to the relief sought by the Respondent, as set out in its letter dated March 19, 2019.

[4] By a second notice in motion in writing, dated March 28, 2019, the Attorney General seeks an order extending the time for filing his application for judicial review. This notice of motion is supported by the affidavit of Mr. George Vuicic, the lawyer with carriage of this matter on behalf of the Attorney General.

[5] In his affidavit, Mr. Vuicic deposed that he had miscalculated the time for bringing the application for judicial review, that he had mistakenly thought the Christmas recess, as defined in the *Federal Courts Rules* (SOR/98-106) (the "Rules"), was excluded from the calculation of the thirty day period, set out in the *Federal Courts Act* (R.S.C., 1985, c. F-7), subsection 18.1 (2), for commencing an application for judicial review.

[6] The Respondent, by letter dated April 4, 2019, takes the positon with respect to the second notice of motion, that a decision upon this motion is dispositive of his motion to strike.

[7] I will first address the motion for an extension of time.

[8] The test for granting an extension of time is set out in *Canada (Attorney General) v. Larkman* (2012), 433 N. R. 184 (F.C.A.) as follows:

> […] the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (a) Did the moving party have a continuing intention to pursue the application?
>
> (b) Is there some potential merit to the application?
>
> (c) Has the Crown been prejudiced by the delay?
>
> (d) Does the moving party have a reasonable explanation for the delay?

[9] I am satisfied that the Attorney General has met the test. I note that the Registry accepted the application for filing on January 11, 2019, without pointing out any irregularities.

[10] The filing and issuance of the application for judicial review is perfected, *nunc pro tunc*.

[11] I now turn to the Respondent's motion to strike the application for judicial review.

[12] In general, the jurisdiction of the Court to strike an application for judicial review is exceptional and to be exercised in rare circumstances; see the decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. et al.*(1994), 58 C.P.R. (3d) 209 (F.C.A.).

[13] Judicial review of an interlocutory decision is also rare; see the decision in *Canada (Border Services Agency) v. C.B. Powell Limited*, [2011] 2 F.C.R. 332 (F.C.A.).

[14] There is a difference between seeking to strike a notice of application for judicial review on the grounds of prematurity and on the grounds of the availability of an alternative remedy.

[15] In my opinion, the Respondent's submissions about the prematurity of the within notice of application are not persuasive. The effect of the Tribunal's decision is to narrow the issues for the pending hearing of the merits of the Respondent's complaint under the Act.

[16] The Respondent filed a complaint on or about April 23, 2004, alleging discrimination under sections 7, 10, 12 and 14 of the Act. He alleges specifically that he and other black employees at the Toronto Immigration and Refugee Board Office face systemic discrimination that prohibits their career advancement.

[17] In the decision under review, the Tribunal referred to prior judicial proceedings before the Federal Court heard before Justice Hansen and Justice Bédard.

[18] Justice Hansen, in an Order dated August 18, 2009, dealt with a motion in writing made upon the consent of the Respondent, Attorney General of Canada, and allowed, in part, an application for judicial review of a decision of the Commissioner.

[19] The Order of Justice Hansen provides as follows, in paragraphs 2 and 3:

> 2. Setting aside the decision dated October 20, 2008 by Canadian Human Rights Commission (“Commission’”) in so far as it relates to the allegations of systemic discrimination, more precisely the allegations of clustering of visible minorities in lower status positions and underrepresentation of visible minorities as described in paragraphs 57 to 63 and 67 to 73 of the Investigation Report dated June 9, 2008 written by Linda Foy on the following basis:
>
> a) The investigation into the allegations of clustering of visible minorities in lower status positions and underrepresentation of visible minorities in permanent positions at the Immigration and Refugee Board (“IRB”) Toronto Regional office during the period of 12 months preceding the filing of the Complaint with the Commission was not thorough and thus constituted a breach of procedural fairness.
>
> 3. Referring the matter back to the Commission for supplemental investigation conducted by a new investigator in the above allegations;[…]

[20] Justice Bédard, in her decision dated February 11, 2014 and reported as *Norm Murray v. Canadian Human Rights Commission and the Attorney General of Canada* (2014), 448 F.T.R. 27, heard an application for judicial review taken in respect of the decision of the Commission upon the Applicant’s complaint that he filed in April 2004.

[21] Paragraphs 2 and 3 of Justice Bédard’s decision set out the context as follows:

> [2] The Commission forwarded the complaint to the Canadian Human Rights Tribunal [Tribunal] for an inquiry. In a decision dated January 4, 2013, Tribunal member Edward P. Lustig dismissed Mr. Murray’s complaint. Dealing with a motion to dismiss the complaint filed by the IRB, the Tribunal found that the subject matter of Mr. Murray’s complaint had previously been adjudicated by the Public Service Staffing Tribunal [PSST] and applying the doctrines of issue estoppel and abuse of process, the Tribunal found that adjudicating the complaint would amount to an abuse of its process.

> [3] The applicant filed an application for judicial review challenging that decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. […]

[22] In my opinion, the effect of the Tribunal's decision about the contents of the "Statement of Particulars" can contribute to the orderly prosecution of the hearing before the Tribunal.

[23] In light of the history of the Respondent's complaint, including prior proceedings before the Commission and in this Court, I am satisfied that the commencement of an application of judicial review by the Attorney General is appropriate.

[24] According to the decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364, restrained intervention in an ongoing administrative process is based on practical and theoretical considerations. These considerations include avoidance of review without a full record and avoidance of review on the correctness standard when reasonableness may be the appropriate standard, as well as the prevention of multiple proceedings and interference with comprehensive legislative regimes.

[25] For the foregoing reasons, I am satisfied that in the particular circumstances of the Respondent`s complaint, including the passage of time and previous judicial decisions, the motion to strike out the within application for judicial review should be dismissed.

[26] An Order will issue addressing the disposition of the two motions. In the exercise of my discretion pursuant to Rule 400 of the Rules, costs will be in the cause.

ORDER in T-101-19

THIS COURT'S ORDER is that the motion to extend the time for the commencement of the application for judicial review is granted and the application for judicial review is deemed to have commenced on January 11, 2019.

The motion to dismiss the application for judicial review is dismissed.

In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, costs are in the cause.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-101-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. NORM MURRAY AND CANADIAN HUMAN RIGHTS COMMISSION

MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	HENEGHAN J.
DATED:	MAY 29, 2019

WRITTEN REPRESENTATIONS BY:

George G. Vuicic Anne M. Lemay	FOR THE APPLICANT (ATTORNEY GENERAL OF CANADA)
David Yazbeck	FOR THE RESPONDENT, NORM MURRAY
Ikram Warsame Samar Musallam	FOR THE RESPONDENT, CANADIAN HUMAN RIGHTS COMMISSION

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