Federal Court Cour fédérale

Date: 20220815

Docket: T-321-22

Citation: 2022 FC 1202

Ottawa, Ontario, August 15, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DAMON ATWOOD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This is an appeal pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106, from the Prothonotary's Judgment dated June 13, 2022, striking out the Applicant's application for judicial review [the Application], without leave to amend.

[2] The Application seeks review of "the decision of Rakhi Dhawan (the "Refusal"), in her capacity as Director of the Office for the Coordination of Grievances and Appeals ("OCGA"), to

refuse the Applicant and others access to past decisions rendered by the Royal Canadian Mounted Police ("RCMP")'s grievance adjudicators (the "Decision Records")."

[3] The Applicant seeks

1. an Order that the RCMP immediately undertake to provide members of the RCMP with access to all Decision Records in an anonymized format, and furthermore to release said Decision Records upon request to members engaged in grievance procedures under the *RCMP Act*;
2. in the alternative, a Declaration that the portions of the RCMP's Administrative Manual, which operate to exclude decisions, acts, or omissions of the OCGA from the grievance procedures contained within the *RCMP Act* and *CSO's*, to be *ultra vires* and of no force and effect; and
3. an Order of *mandamus* compelling the RCMP adjudicators, exercising delegated authority of the Commissioner of the RCMP, to render their decision on standing in the Applicant's grievance file, as outlined in this application, no later than thirty (30) calendar days from the date of this Court's order.

[4] It is undisputed that after receipt of the Refusal, the Applicant, on October 4, 2021, filed a grievance in respect of the Refusal. It is also undisputed that the OCGA takes the position that the Refusal cannot be the subject of a grievance, that the parties have made submissions to the Initial Level Adjudicator on the preliminary issue of standing to bring the grievance, that no decision has been rendered, and that no timeline has been given as to when a decision may be made.

[5] In his affidavit filed in reply to the Respondent's motion to dismiss, the Applicant referenced a matter relating to the RCMP commenced in this Court: *Baldwin et al v Attorney General of Canada*, Court File T-1017-21. The Applicant attests that in the Respondent's

Record was "data related to the average time for a decision on the merits when a file was received by an adjudicator; the average for 2020 was 824 days."

[6] It is agreed that the standard to be applied on this appeal is that set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*]. The decision should only be interfered with "if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law" (*Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 4 [*Maximova*]). A palpable and overriding error is "one which is obvious and apparent, the effect of which is to vitiate the integrity of the reasons" (*Maximova* at para 5).

[7] The Applicant has advanced several grounds upon which he says the Prothonotary erred in this case. I need not consider all of them, as I am satisfied that there is one palpable and overriding error that warrants allowing this appeal.

[8] The Prothonotary correctly noted the law that an applicant's failure to exhaust all the adequate remedial remedies available to them is a fatal flaw that, absent exceptional circumstances, justifies a preliminary dismissal of the application: *Canada (Border Services Agency) v CB Powell Limited* , 2010 FCA 61 at para 31[*CB Powell*]. She rejected the Applicant's submission that the grievance filed is not an adequate and effective remedy. At paragraphs 23 and 24, she writes:

> [23] Although the Applicant has filed a grievance, he argues that it does not constitute an adequate remedy because of the existence of an internal policy that effectively insulates the OCGA Director from a grievance. That policy is contained in the RCMP's

> Administrative Manual and provides: "No decision, act, or omission made in good faith by a person acting as an adjudicator, OCGA case manager, or officer in charge of the OCGA may be the subject of a harassment complaint or grievance". That policy notwithstanding, the parties, (the Applicant and the OCGA Director) have prepared submissions on the issue of standing to bring the grievance and those submissions are now before an Initial Level Adjudicator. No decision has been rendered by the Initial Level Adjudicator nor a final decision of the Commissioner under the *RCMP Act*.
>
> [24] While the Applicant contends that the outcome of his grievance is pre-determined by the existence of the policy, I find that is mere conjecture. The Respondent rightly notes the OCGA Director, as the subject of the grievance and not the adjudicator of the grievance, has taken the position that a grievance of its decision is not available by virtue of the policy. Nevertheless, the matter is now in the hands of the Initial Level Adjudicator for decision. In those circumstances, I am satisfied that there is an adequate and effective process available to the Applicant notwithstanding the possibility or even the certainty that his grievance may be dismissed. [emphasis added]

[9] It is regrettable that the self-represented Applicant failed to bring to the attention of the Prothonotary that the inevitability of the outcome is not just because of a "policy" but because of subsection 16(2) of the *Commissioner's Standing Order (Grievances and Appeals)*, SOR/2014-289 [CSO (Grievances and Appeals)]. An adjudication decision included in the Applicant's Motion Record noted this. That adjudication decision reads, in part, as follows:

> [13] As a reminder to the Grievor, Parliament has limited my authority, as stated in subsection 16(2) of the CSO (Grievances and Appeals). This legislative provision only allows me to determine whether a decision, act or omission was made consistently with policy. There is no provision to allow me to determine that a policy is invalid.

[10] Subsection 16(2) of CSO (Grievances and Appeals) provides as follows:

16 (2) An adjudicator, when rendering the decision, must consider whether the decision, act or omission that is the subject of the grievance is consistent with the relevant law, or the relevant Treasury Board or Force policy and, if it is not, whether it has caused a prejudice to the grievor.	**16 (2)** Lorsqu'il rend la décision, l'arbitre évalue si la décision, l'acte ou l'omission qui fait l'objet du grief est conforme à la législation pertinente ou à la politique pertinente du Conseil du Trésor ou de la Gendarmerie et si, en cas de non-conformité, un préjudice a été causé au plaignant.

[11] There is no dispute that a policy was applied in reaching the decision sought to be reviewed. Accordingly, it is not "mere conjecture" what the outcome of the grievance will be – it is a certainty.

[12] With that appreciation, the Prothonotary had to turn her mind to assess whether a "paper tiger" grievance that would likely take in excess of two years to reach a prescribed negative decision is an "adequate alternative remedy" as described in *CB Powell*. At paragraph 31 of *CB Powell*, Justice Stratas writes: "[A]bsent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process <u>must pursue all effective remedies</u> that are available within that process; only when the administrative process has finished <u>or when the administrative process affords no effective remedy</u> can they proceed to court." [emphasis added]

[13] In my view, in light of the evidence and law, the grievance process here, affords the Applicant no effective remedy. Accordingly, he can proceed to court.

[14] For these reasons, I am convinced that this appeal must be allowed, and the application for judicial review permitted to continue.

[15] The Applicant is entitled to his costs both here and below, which I assess at $1,000, inclusive of disbursements and taxes.

ORDER in T-321-22

THIS COURT ORDERS that:

1. This appeal is allowed;
2. The decision of the Prothonotary dated June 13, 2022 is set aside;
3. The Applicant is awarded his costs both on the appeal and below, inclusive of disbursements and taxes, fixed at $1,000.00, to be paid forthwith by the Respondent to the Applicant.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-321-22
STYLE OF CAUSE:	DAMON ATWOOD v ATTORNEY GENERAL OF CANADA

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

ORDER AND REASONS:	ZINN J.
DATED:	AUGUST 15, 2022

WRITTEN REPRESENTATIONS BY:

Damon Atwood	FOR THE APPLICANT (ON HIS OWN BEHALF)
Amanda Neudorf	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT