Federal Court  Cour fédérale

Date: 20091229

Docket: T-1664-08

Citation: 2009 FC 1313

Ottawa, Ontario, December 29, 2009

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

CORPORAL PATRICK G. WASYLYNUK
Regimental Number 36606

Applicant

and

SUPERINTENDENT B.P. HARTL, WILLIAM J.S. ELLIOTT,
Commissioner of the ROYAL CANADIAN MOUNTED POLICE,
ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] At the hearing of this judicial review, counsel for the Respondents raised a preliminary issue. A review of the facts leading up to the filing of the Notice of Application will provide the context in which this preliminary issue has arisen.

[2] The Applicant, a member of the Royal Canadian Mounted Police (RCMP) since 1981, has been on sick leave since June 16, 2003. In March 2008, the Applicant commenced an action against the RCMP in the Alberta Court of Queen's Bench for damages suffered as a result of alleged workplace harassment.

[3] On June 24, 2008, a Designated Officer prepared and the Applicant was served with a Notice of Intention to Discharge "for reason of a physical and/or mental disability". The Notice explained that a three member medical board would be appointed to determine the degree of the Applicant's disability and that the Applicant had 14 days within which to nominate one member of the board and to submit any medical or other documentation.

[4] On July 4, 2008, the Applicant filed a grievance against "the initiation of a 'Notice of Intention to Discharge'" seeking "the withdrawal or stay of the 'Notice of Intention to Discharge'." On the same day, the Applicant advised the Designated Officer who had initiated the discharge process that a grievance had been filed and stated that pending a determination of the grievance the discharge process should be held in abeyance.

[5] On July 22, 2008, in response to the Applicant's grievance submissions on the question as to whether a Notice of Intention to Discharge may be the subject of a grievence, the Designated Officer noted that the RCMP Administrative Manual Appendix II-38-2 lists a number of notices and decisions that are non-grievable; that each of the listed matters has a specific process for redress, review or appeal under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (Act), the

Royal Canadian Mounted Police Regulations, 1988 SOR/8-361 (Regulations), or the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181; and that according to the list a Notice of Intention to Discharge pursuant to subsection 20(1) of the Regulations is a non-grievable decision.

[6] On August 12, 2008, the Return to Work Coordinator advised the Applicant since he had declined to nominate his own physician, the Commanding Officer would select the members of the medical board and that the Commanding Officer would make a decision based on the board's recommendation. He was also informed that if the Commanding Officer decided that he should be medically discharged, he could grieve this decision.

[7] In his reply of August 14, 2008, the Applicant reiterated his position that the medical discharge process should be held in abeyance until the grievance was determined. He also stated that if the grievance process proved to be unsuccessful he intended to nominate a physician to sit on the medical board.

[8] On August 15, 2008, the Return to Work Coordinator informed the Applicant that the medical board process would not be held in abeyance as the grievance process is a separate and parallel process to the medical board. He also advised the Applicant that if the Commanding Officer determined that he should be discharged, he could grieve that decision and the medical discharge process would be held in abeyance until the situation was resolved.

[9] The Applicant filed his Notice of Application on October 28, 2008. He states in the Notice of Application that he is applying for "a stay of the medical discharge process pending the disposition of a grievance or any further appeals there under of the grievance filed by the Applicant on the 4th day of July 2008." In addition to a summary recital of the facts set out above, under the grounds for the application, the Applicant states that in "a case where a grievance is filed, s. 26 of the RCMP Act Regulations 1988 imposes a stay until after the final disposition of the grievance of appeal."

[10] At the judicial review hearing, counsel for the Respondents raised a preliminary question as to whether the proceeding is a properly constituted judicial review. In particular, the Respondents' counsel noted that no decision was identified in the Notice of Application. Further, it was not possible to discern whether mandamus, prohibition or other interlocutory relief was being sought. However, this issue had not been raised in the Respondents' written submissions. Following a discussion regarding the procedure that should be followed since the Applicant was unaware of this position, the parties agreed that the Court should hear submissions on the merits coupled with an opportunity to make additional submissions in writing.

[11] At the hearing, I raised another matter with the Applicant. Included in the Applicant's record at page 24 is a September 18, 2008 memorandum from the Case Manager, Office for the Coordination of Grievances, advising the Designated Officer that the Level 1 adjudicator had denied the Applicant's grievance. According to the memorandum, a copy of the decision was enclosed, however, it was not included in the record. The memorandum also states that the Designated

Officer would be notified if the Applicant requested a referral to Level II. Although the memorandum is included with exhibit "H" to the Applicant's affidavit, there is no reference to the memorandum in the body of the Applicant's affidavit or in the Applicant's written submissions. The Applicant's counsel confirmed that the Level 1 adjudicator had denied the grievance and that the grievance had proceeded to the next level.

[12] In their supplementary submissions, the Respondents point out that initially on their reading of the Notice of Application and the Applicant's written submissions they had understood that the Applicant was seeking a stay of proceedings under section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. However, as it had become apparent at the hearing that this was not the relief being sought no further submissions were being made in this regard.

[13] The Respondents submit that the Notice of Application does not comply with the requirements of Rule 301 of the *Federal Courts Rules*, SOR/98-106. In particular, the Applicant has not named a tribunal or decision maker, he has not identified a decision or order, he has not indicated the grounds upon which relief is being sought, and he has not specified the form of relief he is seeking. Accordingly, the application should be dismissed. Further, the Respondents argue that the application cannot succeed on its merits.

[14] In his supplementary submissions, the Applicant acknowledges that the Notice of Application could have been clearer. He points out, however, that there was never a formal decision

not to stay the “discharge” although it was evident that the Respondents were refusing to stay the “discharge” pending the outcome of the completion of the grievance process.

[15] As he acknowledged at the hearing, the Applicant reiterates that the within proceeding was never an application for a court ordered stay. Instead, it was brought to require the Respondents to comply with the stay found in section 26 of the Regulations.

[16] The Applicant also asks the Court to exercise its jurisdiction to allow the application to be amended to include a request for “an order in the nature of mandamus requiring the Respondents to stay the discharge pending final completion of the grievance or an order in the nature of prohibition stopping the discharge process pending the final completion of the grievance.”

[17] I agree with the Respondents that the Notice of Application is less than clear. In the Notice of Application, the Applicant states that he “makes application for a stay of the medical discharge process pending the disposition” of his July 4, 2008 grievance. Under the grounds for the application, he states that “[i]n a case where a grievance is filed, s. 26 of the RCMP Act Regulations 1988 imposes a stay until after the final disposition of the grievance or appeal.”

[18] Cast in its most positive light from the Applicant’s perspective, it would appear that the Applicant is asking the Court to enforce a stay to which he believes he is entitled under the Regulations.

[19] In this proceeding, the Applicant's position that the discharge process should be stayed pending a final determination of his grievance is premised on his contention that he is entitled to grieve the Notice of Intention to Discharge. He submits that pursuant to subsection 31(1) of the Act any member of the RCMP aggrieved by a decision, act or omission for which no other process for redress is provided in the Act, the Regulations, or the Commissioner's Standing Orders is entitled to present a grievance. I note that in his grievance submissions the Applicant advanced this same position and sought the same remedy, namely, that the discharge process should be held in abeyance pending a final determination of his grievance.

[20] In these circumstances where the central issue and the remedy being sought in the grievance process are the same as those in the within proceeding and, ultimately, the final decision in the grievance process may be judicially reviewed in this Court, in my opinion, it would be premature for the Court to intervene before the statutory means of redress have been exhausted.

[21] With regard to the Applicant's request that he be permitted to amend his Notice of Application to include the remedies of mandamus or prohibition, as he has not advanced any basis upon which these remedies could be granted they will not be considered.

[22] For these reasons, the judicial review will be dismissed with costs to the Respondents.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs to the Respondents.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1664-08
STYLE OF CAUSE:	CORPORAL PATRICK G. WASYLYNUK v. SUPERINTENDENT B.P. HARTL, ET AL
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APPEARANCES:

Gary Romanchuk	FOR THE APPLICANT
Barry Benkendorf	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

OGILVY LLP Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENTS