Federal Court of Appeal  Cour d'appel fédérale

Date: 20130523

Docket: A-314-12

Citation: 2013 FCA 134

CORAM: **EVANS J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 22, 2013.

Judgment delivered at Ottawa, Ontario, on May 23, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Rachel Exeter from a decision of the Federal Court, dated June 21, 2012, in which Justice Scott (Judge) granted two motions brought by the Attorney General, both "with costs to follow", and dismissed Ms Exeter's cross-motion.

[2] The motions arise from Ms Exeter's application for judicial review of a decision in which the Chairperson of the Public Service Labour Relations Board (Board) (2012 PSLRB 24) held that

the Board has no power to remove the adjudicator seized of her grievance. Ms Exeter had requested the Adjudicator's removal on the ground of bias. She alleges that, having participated in the mediation of Ms Exeter's grievances, the Adjudicator cannot impartially determine Ms Exeter's claim that she was coerced into the settlement.

[3] In his reasons for decision, the Chairperson also stated (at para. 15) that, even if the Board had the power to remove the Adjudicator from hearing Ms Exeter's grievances, it would be inappropriate to exercise it. It would be better, in his view, for the Adjudicator to determine Ms Exeter's request for recusal. Ms Exeter currently has an application for judicial review in the Federal Court (Court File No. T-943-12) challenging the Adjudicator's decision not to recuse herself.

Style of cause motion

[4] The Attorney General's first motion requested that the style of cause in the present proceeding be amended by naming the Attorney General as the sole Respondent. Ms Exeter had named the Attorney General as Respondent, and had added the Board in parenthesis. In her cross-motion, Ms Exeter argues that the Chairperson of the Board should be named as the sole Respondent, because it is his decision that she seeks to set aside in her application for judicial review.

[5] I agree with the Judge that rule 303(1)(*a*) of the *Federal Courts Rules*, SOR/98-106, specifically provides that the decision-maker in respect of whom an application for judicial review is brought is not to be named as Respondent. Hence, whether the decision-maker under review is the

Board or, as Ms Exeter alleges, the Chairperson, the Attorney General is appropriately named as the sole Respondent in the style of cause.

Transfer motion

[6] The Judge also granted the Attorney General's motion requesting that, since the decision under review was a decision of the Board, Ms Exeter's application for judicial review be transferred to this Court from the Federal Court under rule 49 of the *Federal Courts Rules*. Paragraph 28(1)(*i*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides that applications in respect of the Board shall be brought in the Federal Court of Appeal.

[7] I agree with the Judge. Ms Exeter had requested the Board to exercise its statutory powers to remove the adjudicator, the Chairperson dealt with the request by examining the powers of the Board, and its Order denying Ms Exeter's request is stated to be an Order of the Board. This is not a decision of the Chairperson in an "executive" capacity.

[8] Nor do I accept Ms Exeter's argument that the Judge's decision was erroneous because it improperly "overruled" a decision by Justice Harrington of the Federal Court, dated May 7, 2012. That decision granted her motion for an extension of time in which to file an application for judicial review in the Federal Court. After reviewing some of the procedural history of this matter, including its transfer under rule 49 from this Court to the Federal Court, Justice Harrington ordered that Ms Exeter's application should be "accepted for filing" in the Federal Court "in the interests of justice". This was not a determination by Justice Harrington that the Federal Court had jurisdiction over Ms Exeter's application.

Costs

[9] Ms Exeter argues that the Judge erred when he awarded "costs to follow" against her on both motions, because the Attorney General had not requested costs. Counsel for the Attorney General says that he asked for costs on the style of cause motion, but not on the transfer motion. However, he argues, this latter omission is immaterial because the Court had discretion to award costs in the cause on its own motion. He relies on *Lubrizol Corp. v. Imperial Oil Ltd.* (1989), 103 N.R. 237 (C.A.) (*Lubrizol*), where this Court reversed an award of costs on a motion for an interlocutory injunction because counsel had not requested them, and substituted an award of costs in the cause.

[10] I assume that by "costs to follow" the Judge in the present case meant that the party who succeeded in the application for judicial review would be entitled to the costs of the motions. That is, he awarded costs in the cause.

[11] As counsel for the Attorney General conceded at the hearing of this appeal, there is no evidence in the record before this Court that he requested costs in either motion in the Federal Court. The question, therefore, is whether the Attorney General is correct to say that the absence of a request for costs does not preclude a judge on an interlocutory motion from awarding costs in the cause.

[12] The general principle is that a court may not award costs when costs were not requested: see, for example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are

awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[13] In my view, this principle is not limited to final costs, but is equally applicable to an award of costs in the cause. Such an award imposes a financial liability, albeit one that is contingent on the outcome of the underlying proceeding.

[14] A judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application: *Merck & Co. v. Apotex Inc.*, 2006 FCA 324, 55 C.P.R. (4th) 81 at para. 15; *Polish National Union of Canada Inc.-Mutual Benefit Society v. Palais Royale Ltd.* (1988), 163 D.L.R. (4th) 56 (Ont. C.A.). For this purpose, an order on an interlocutory motion that is silent on costs is treated as an award of no costs: *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333, 57 C.P.R. (4th) 58 at para. 13; *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* (2002), 22 C.P.R. (4th) 332 (Ont. C.A.) at para. 36.

[15] Counsel for the Attorney General relies on the following statement in *Lubrizol* as authority for the proposition that a court may award costs in the cause, even though no request for costs had been made:

> On one minor point, however, it is clear that the Motions Judge erred. In her Order, she awarded the costs of the Motion to the plaintiffs. *Such costs* had not been asked for in the Motion or spoken to at the hearing and no mention is made of them in the Motions Judge's reasons. An award of costs other than "in the cause" in such circumstances is not a proper exercise of judicial discretion. (Emphasis added)

[16] While it is clear from this passage that the party had not asked for the costs of the motion, it is not clear whether costs in the cause had been requested. In the present case, however, there is no evidence that the Attorney General requested even costs in the cause. It seems to me unlikely that the Court in *Lubrizol* would have departed from a basic principle of fairness by awarding costs in the cause when they had not been requested. Accordingly, I do not regard *Lubrizol* as authority for the proposition that a court may award costs in the cause when no costs have been requested.

[17] In the absence of any evidence in the record that the Attorney General requested any costs, the Judge in the present case should not have awarded them, despite the broad discretion over costs now conferred by rule 400 of the *Federal Courts Rules*. The contingent liability imposed by the Judge's costs in the cause Order is sufficient to attract the duty of procedural fairness. Consequently, it was a breach of that duty for the Judge to award costs in the cause, because Ms Exeter, a self-represented litigant, had not had adequate notice that she might be required to pay costs, or an opportunity to respond.

Conclusion

[18] For these reasons, I would dismiss Ms Exeter's appeal against the grant of the Attorney General's motions, and against the denial of her cross-motion, but would set aside the order for costs in the Attorney General's motions.

[19] I would not award costs below or on the appeal because success has been divided, and the procedural confusions that have plagued these proceedings are not primarily attributable to Ms Exeter.

"John M. Evans"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SCOTT OF THE FEDERAL COURT DATED JUNE 21, 2012, FILE NO. T-944-12)

DOCKET:	A-314-12
STYLE OF CAUSE:	Rachel Exeter and Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	SHARLOW AND DAWSON JJ.A.
DATED:	May 23, 2013

APPEARANCES:

Rachel Exeter	ON HER OWN BEHALF
Adrian Bieniasiewicz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT