Federal Court of Appeal | Cour d'appel fédérale

Date: 20220124

Docket: A-3-21

Citation: 2022 FCA 11

CORAM: **PELLETIER J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

KEITH HERBERT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry, on January 18, 2022.

Judgment delivered at Ottawa, Ontario, on January 24, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: PELLETIER J.A.
LOCKE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220124

Docket: A-3-21

Citation: 2022 FCA 11

CORAM: **PELLETIER J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

KEITH HERBERT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

LEBLANC J.A.

[1] The Court is asked to judicially review an interlocutory decision made orally by a member of the Federal Public Sector Labour Relations and Employment Board (the Board), regarding the scope of the evidence the applicant would be permitted to tender at the remedy phase of an arbitration process initiated under the *Federal Public Sector Labour Relations Act*, enacted pursuant to section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the Act).

[2] The applicant is a former employee of the Parole Board of Canada (the PBC). His employment with the PBC was terminated effective May 22, 2015, for unsatisfactory performance. The applicant grieved that decision pursuant to the Act. He also alleged having been discriminated against in an ongoing manner by the PBC with respect to his disability.

[3] That grievance, together with seven other grievances the applicant had filed against the PBC prior to termination, was referred to the Board for arbitration. At the request of the parties, the arbitration process was bifurcated, the Board proceeding first with the issue of the PBC's alleged liability. A number of these grievances were withdrawn; others were dismissed. In the end, only the ones relating to termination and PBC's failure to accommodate the applicant's disability were allowed by the Board in a decision issued on September 11, 2018.

[4] After unsuccessful attempts on the part of the applicant to have the Board member assigned to his case recuse himself, the arbitration process shifted to the remedy phase. At the very outset of the remedy hearing, on December 1, 2020, the Board was called upon to make a determination regarding the scope of the evidence that could be presented at that hearing. This was in response to the applicant's expressed desire to file evidence showing that he had been discriminated against not only with respect to termination but also from the day he joined the PBC, something to which the respondent objected.

[5] The next day, the Board ruled that the applicant was bound by the findings set out in the liability decision, including those related to the discrimination involved in the failure to accommodate that led to the termination of employment. As a result, this would not permit the

applicant to “go back to the beginning of his employment” (Transcript of the December 2, 2020 hearing, Applicant’s Record at 92).

[6] This is the decision the applicant is challenging in the present proceedings. The applicant contends that this decision deprives him of a full opportunity to be heard, as recent Supreme Court jurisprudence, according to him, confirms that the manner of dismissal can be examined retrospectively, not just at the point of termination. At the request of the parties, the Board agreed to adjourn the remedy hearing in order to allow the applicant to seek judicial review of this interlocutory decision.

[7] In the application before this Court, the applicant seeks an order setting aside that interlocutory decision as well as an order permitting him to lead full evidence relating to discrimination throughout his employment with the PBC.

[8] Unfortunately for him, this Court cannot do so because this judicial review proceeding is premature. As this Court held in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at para. 31 (*CB Powell*), “absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course”, a principle that “applies to all matters that arise during the administrative process” (*Klos v. Canada (Attorney General)*, 2021 FCA 238, 2021 CarswellNat 5590 at para. 6).

[9] The principle of judicial non-interference with ongoing administrative processes is important because it “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". This principle allows reviewing courts, when a matter comes to them "at the end of the administrative process", to "have all of the administrative decision-maker's findings", which "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience" (*CB Powell* at para. 32).

[10] The Court, in *CB Powell*, noted that courts across Canada have enforced that principle "vigorously", as evidenced by the "narrowness of the 'exceptional circumstances' exception", which is "best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings" (*CB Powell* at para. 33).

[11] Thus, procedural fairness concerns, which are what the applicant is voicing regarding the impugned interlocutory decision, do not meet the high threshold of exceptionality; important legal, jurisdictional or constitutional issues do not either. As well, of particular note for the present matter is the fact that the consent of all parties to early recourse to the courts does not constitute an exceptional circumstance engaging the exception to the principle of non-interference with ongoing administrative processes (*CB Powell* at paras. 33 and 39-46).

[12] These principles were reiterated with vigor in the recent case of *Dugré v. Canada (Attorney General)*, 2021 FCA 8, [2021] F.C.J. No. 50 (QL/Lexis) (*Dugré*), where this Court,

raising the issue on its own motion, held that the non-availability of interlocutory relief was "next to absolute" (*Dugré* at para. 37). It underscored the fact that the "very rare" circumstances that would allow a party to bypass the administrative process "require that the consequences of an interlocutory decision be so 'immediate and radical' that they call into question the rule of law" (*Dugré* at para. 35, quoting *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 at paras. 31-33).

[13] The Court warned against a "less stringent criterion" that "would only encourage premature forays into courts and a resurgence of the ills identified in *C.B. Powell*". In particular, it pointed to "certain recent attempts by the Federal Court to restate the settled test by refining criteria for exceptions", holding that they were "ill-advised and should not be viewed as authoritative" and that they "only serve[d] to muddy the waters and compromise the rigour of the principle of non-interference" (*Dugré* at para. 37) (emphasis added).

[14] One of these attempts was made in *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 F.C.R. 217 (*Whalen),* where the Federal Court held that the "hardship to the applicant" was one criterion to be assessed in determining whether an exception to the prohibition on judicial review of interlocutory rulings was warranted in a given case (*Whalen* at para. 21, quoting *Almrei v Canada (Citizenship and Immigration),* 2014 FC 1002, 466 F.T.R. 159 at para. 34).

[15] This is precisely the concern raised by the applicant in this case. He urged the Court at the hearing of his application to look into the "practical realities" of the present matter: the costs

associated with the prospect of having to come back to this Court and having to raise the same issue; his situation of vulnerability arising from his disability and the fact he lost his job; and the quasi-unlimited means of his adversary to defend against his proceedings before the Board.

[16] These considerations are of no assistance to the applicant. As stated in *Dugré*, restating the exceptionality test so as to include this type of considerations "would only encourage premature forays into courts" and "compromise the rigour of the principle of non-interference" (*Dugré* at para. 37).

[17] It cannot be said either that the consequences of the Board's evidentiary interlocutory decision are so "immediate and radical" that they would compromise the rule of law. The application of the principle of non-interference in the case at hand will not deprive the applicant of his rights as he would maintain the ability to challenge the Board's decision on remedy, including any evidentiary issue that might have come up during the remedy hearing, once the arbitration process has run its course. As stated in *CB Powell*, if the applicant eventually challenges that decision, the Court would then have the full benefit of all of the Board's findings suffused, as they may be, "with expertise, legitimate policy judgments and valuable regulatory experience", something the Court does not have at this point in time (*CB Powell* at para. 32).

[18] Finally, there are no circumstances in the present matter that could justify the issuance of a writ of prohibition. It is trite that writs of prohibition are issued by reviewing courts to direct a lower court or an administrative decision maker not to proceed with a matter that does not fall within its jurisdiction (Guy Régimbald, *Canadian Administrative Law*, 3rd ed. (Toronto,

LexisNexis, 2021) (Régimbald) at 592; D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed. (Toronto: Canvasback Publishing, 2009) (looseleaf updated 2021) at 1:4). This is obviously not the case here as it is well within the Board's jurisdiction, as a trier of fact, to set its own procedure and determine evidentiary issues (the Act at s. 146(1); Régimbald at 324-325; see also *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494, at 487). This is not disputed.

[19] In sum, the threshold for exceptionality is high, and the applicant has not raised any circumstances before this Court that would justify a departure from the general, important rule that a party cannot seek judicial review of an interlocutory administrative decision.

[20] I would therefore dismiss the application for judicial review, but would do so without costs, as the respondent seemed content to bypass the administrative process and have this judicial review application decided on the merits. Each party, therefore, shall bear its costs.

"René LeBlanc"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-3-21
STYLE OF CAUSE:	KEITH HERBERT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	JANUARY 18, 2022
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	PELLETIER J.A. LOCKE J.A.
DATED:	JANUARY 24, 2022

APPEARANCES:

Howard Markowitz	FOR THE APPLICANT
Joel Stelpstra	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MARKOWITZ LLP Toronto, Ontario	FOR THE APPLICANT
A. François Daigle Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT