Federal Court of Appeal  Cour d'appel fédérale

Date: 20131219

Docket: A-473-12

Citation: 2013 FCA 293

CORAM: **PELLETIER J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

TREVOR KNISS

Appellant

and

THE TELECOMMUNICATION WORKERS UNION (TWU)

Respondent

and

TELUS COMMUNICATIONS INC.

Respondent

Heard at Calgary, Alberta, on November 26, 2013.

Judgment delivered at Ottawa, Ontario, on December 19, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] It is commonly said that the rules of procedure are a minefield for lay litigants. This is an appeal by a lay litigant who stepped on a mine. Because of a missed deadline for filing proof of service of a document, the appellant, Mr. Kniss, was forced to bring a motion for an extension of time. His motion was dealt with by a prothonotary who dismissed it, and went on to dismiss his application for judicial review. A Federal Court judge upheld the prothonotary's decision. Mr. Kniss now appeals to this court.

[2] In 2007, Mr. Kniss was fired by the respondent Telus Communications Inc. (Telus) as a result of a dispute arising out of Telus' obligation to accommodate his physical limitations. Mr. Kniss grieved both Telus' failure to reasonably accommodate him as well as his dismissal. In 2009, an arbitrator found for the employer with respect to the dismissal grievance, and reserved jurisdiction to proceed with the accommodation grievance if the parties wished to pursue it. The grievance was not pursued.

[3] While his grievances were pending, Mr. Kniss also filed two complaints with the Canadian Human Rights Commission (CHRC). In his first complaint, prior to his dismissal, he alleged that Telus had failed to reasonably accommodate his physical limitations. In the second, he alleged that Telus had retaliated against him in various ways, ultimately by dismissing him. The CHRC declined

to deal with his complaints, as it was of the view that they had, in substance, been dealt with in the grievance arbitration.

[4] This appeal arises in the course of Mr. Kniss' application for judicial review of the CHRC'S refusal to act upon his complaints.

PROCEDURAL HISTORY

[5] As noted above, Mr. Kniss missed the deadline for filing the affidavit of service of his Rule 306 affidavit and was required to bring a motion for an extension of time.

[6] The prothonotary who dealt with the motion under Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), applied the four factor test set out in this Court's decision in *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (*Hennelly*) in which it was held that an applicant seeking an extension of time must show:

a) a continuing intention to pursue his proceeding;

b) that his proceeding has some merit;

c) that the respondent will not be prejudiced by the delay; and

d) that there is a reasonable explanation for the delay.

[7] The prothonotary noted that 50 days had elapsed between the registry's refusal to accept Mr. Kniss' affidavit of service and the filing of his motion for an extension of time. In light of this delay, for which no suitable explanation was provided, the prothonotary was not persuaded that Mr. Kniss had a continuing interest in pursuing his application throughout this period.

[8] The prothonotary then considered whether Mr. Kniss had established that his application for judicial review had any merit. Relying on the affidavit filed by the respondent, the prothonotary noted that the CHRC declined to hear Mr. Kniss' complaints because the issues raised by the complaints had been dealt with in the grievance process. Noting that the issues raised in Mr. Kniss' application for judicial review were currently the subject of proceedings before the Alberta Court of Queen's Bench, the prothonotary found that the application for judicial review constituted an abuse of process.

[9] The prothonotary concluded by observing that the overriding principle in applications for extensions of time is that justice be done. In this case, the interests of justice militated against granting an extension of time to proceed with an application that was doomed to fail.

[10] The prothonotary dismissed the motion for an extension of time and, on his own motion, dismissed Mr. Kniss' application for judicial review.

[11] Mr. Kniss appealed the prothonotary's decision to a judge of the Federal Court. The judge noted the standard of review from the decision of a prothonotary, set out by this Court in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 FC 425, and, more recently, in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459. Applying that test, the judge reasoned that the prothonotary's decision to dismiss the application for judicial review was vital to the case and therefore he, the judge, should hear the matter *de novo*.

[12] The judge noted that the prothonotary had correctly identified the test to be applied and had correctly applied it. He also took into account the prothonotary's assertion that the very issues raised in the application for judicial review were currently before the Alberta Courts and that, as a result, the application for judicial review constituted an abuse of process.

[13] The judge found no reason to conclude that the prothonotary's decision was clearly wrong or based on a misapprehension of the facts such that the Court would have exercised its discretion differently. Accordingly, he dismissed Mr. Kniss' appeal.

DISCUSSION

[14] The standard of review to be applied by this Court on appeal from a judge sitting on appeal from a prothonotary's decision was laid out by the Supreme Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, at paragraph 18:

> …An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong: *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.), *per* Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi.

[15] This formulation of the test appears to be based upon a case in which the motions judge interfered with the prothonotary's decision. There may be cases where the motions judge does not intervene when he ought to have. In those cases, an appellate court may intervene where there were grounds justifying its intervention, namely when the prothonotary acted upon a wrong principle or his or her decision was clearly wrong. In that event, the appellate court must examine the record *de*

novo: see *Bristol-Myers Squib Co v. Apotex Inc.*, 2011 FCA 34, [2011] F.C.J. No. 147 at paragraph 7.

[16] In this case, the Federal Court judge was correct in finding that the issue, the dismissal of Mr. Kniss' application, was vital to the case and in finding that he should review the matter *de novo*. Unfortunately, it does not appear that he did so. If one is to judge by his order, which is all we have, he simply reviewed what the prothonotary had done and expressed his agreement with the result. A *de novo* review requires a fresh look at the evidence and the law as though the matter were being heard for the first time. As a result, the judge identified one principle but acted upon another: in doing so, he erred so as to justify our intervention. It therefore falls to this Court to conduct a *de novo* review.

[17] Before embarking on that review, I wish to say a few words about the somewhat anomalous nature of this case. The filing of an affidavit of service is a necessary but relatively trivial step in a proceeding. It was no doubt surprising to Mr. Kniss to find that this apparently innocuous case of non-compliance with the Rules resulted in his application for judicial review being dismissed, particularly since there was no issue that his Rule 306 affidavit itself had been properly served. The only issue was proof of that fact.

[18] This outcome must have been all the more surprising to Mr. Kniss when he learned that less than one month later, Telus itself missed a filing deadline with respect to a motion record, a document with substantially more bearing on the outcome of a proceeding than an affidavit of service. In that case, Telus asked the Federal Court registry in Calgary to accept the motion record.

It refused. Then, Telus wrote a letter to the Federal Court registry in Ottawa, without copying it to Mr. Kniss, asking that the motion record be accepted for filing. The matter was referred to a prothonotary who simply directed that the document be accepted for filing: see the Appeal book at pages 55-56. No motion for an extension of time was required.

[19] In the circumstances, it is understandable that Mr. Kniss would feel that he was being held to a different standard than was Telus. The unfortunate fact is that he was held to a different standard. Had Telus not written directly to the registry in Ottawa when its motion record was refused for filing in Calgary, the latter would have been forwarded to the same prothonotary who had refused Mr. Kniss' informal request that his affidavit of service be accepted for filing. One presumes that the prothonotary would have been conscious of the need to act consistently and would have required Telus to make a motion seeking an extension of time.

[20] The prothonotary in Ottawa who dealt with the matter would not have known the history of the matter and, since Mr. Kniss was not aware of Telus' letter, he was not in a position to bring it to her attention. In a perfect world, this would not have happened. It is most unfortunate that it did.

[21] That said, this difference in treatment does not, of itself, provide Mr. Kniss with a remedy. Mr. Kniss' motion for an extension of time stands or falls on its own merits. The prothonotary acted within the *Rules* in asking Mr. Kniss to make a motion requesting an extension of time. Once the motion was made, the prothonotary was bound to exercise his discretion according to law. The test for granting an extension of time does not vary according to the nature of the document in issue,

though the decision maker may take the nature of the document into account when exercising his or her discretion.

[22] I now turn to the merits of Mr. Kniss' motion for an extension of time.

[23] Both the prothonotary and the Federal Court judge correctly identified the four factor test in *Hennelly* as the applicable test. I will examine each of the four factors in turn.

[24] The fact that Mr. Kniss took 50 days to bring his motion for an extension of time raised a doubt in the prothonotary's mind as to his continuing intention to pursue his remedies.

[25] On the other hand, an examination of the record shows that Mr. Kniss is a serial litigator. Since his grievance was dismissed, Mr. Kniss has initiated the following proceedings:

a) an application for judicial review of the arbitrator's award which was dismissed by the Alberta Court of Queen's Bench;

b) an appeal to the Alberta Court of Appeal from the striking of his application for judicial review, which is pending;

c) a complaint to the Canada Industrial Relations Board (CIRB) alleging that his union, the Telecommunications Workers Union, (the Union) had failed to fairly represent him in his grievances, which application was dismissed;

d) a request for reconsideration of the CIRB's decision, which was also dismissed;

e) a defamation action against a number of Telus employees and others which was struck out by the Alberta Court of Queen's Bench;

f) an appeal to the Alberta Court of Appeal from the decision striking out his defamation action, which is pending;

g) a complaint to the Alberta Privacy Commissioner with respect to the communications which underlie his defamation action, which was summarily dismissed; and

h) complaints to the Law Society of Alberta with respect to the conduct of his counsel at the arbitration proceedings as well as that of counsel for Telus, both of which complaints were dismissed.

Appeal Book at pages 71-72.

[26] Notwithstanding the 50 day delay, Mr. Kniss' litigation history is, in my view, a reliable indicator that he had a continuing intention to pursue his application.

[27] Mr. Kniss explained the delay in bringing his motion by the fact that he lives at some distance from Calgary. While Mr. Kniss is an experienced litigator, he remains a self-represented

litigant. Having regard to the nature of the document for which an extension of time is required, I would put little weight on this factor.

[28] Telus conceded that it would not suffer any prejudice if the application for an extension of time were granted: see Telus' Memorandum of Fact and Law at paragraph 80.

[29] This leaves the last factor: Has Mr. Kniss has shown that his application is meritorious? In order to answer this question, it is necessary to understand the CHRC's decision and the factual background out of which it arose.

[30] As noted earlier in these reasons, this litigation arises out of the Mr. Trevor Kniss' employment with Telus. Mr. Kniss was injured in a work related accident; upon his return to work, Telus provided him with a job which accommodated his physical limitations. This state of affairs continued until 2005 when Telus locked out the members of the Union, including Mr. Kniss.

[31] When the labour dispute was finally resolved and Mr. Kniss returned to work, he was told that his former job had been eliminated. Mr. Kniss insisted upon being provided with a job which accommodated his physical disabilities and Telus set about trying to find him such a job. Telus believed that it had found such a job but Mr. Kniss did not agree. On November 16, 2006, Mr. Kniss filed a complaint with the CHRC alleging that Telus had discriminated against him on the basis of disability by failing to provide him a job which reasonably accommodated his physical limitations.

[32] In February 2007, the Union filed a grievance under the collective agreement in place between Telus and the Union alleging that the employer was failing to accommodate Mr. Kniss' disability.

[33] On June 11, 2007, Mr. Kniss filed a second complaint with the CHRC alleging that Telus had retaliated against him for filing his human rights complaint by, among other things, terminating his short term disability benefits and failing to consider him for jobs for which he was qualified.

[34] Relations between Telus and Mr. Kniss continued to deteriorate until Telus fired Mr. Kniss on July 7, 2007. Mr. Kniss' second complaint to the CHRC was then amended to include the fact that he had been dismissed. On July 19, 2007, the Union grieved his dismissal, alleging wrongful termination.

[35] The CHRC was aware of the fact that Mr. Kniss was pursuing his remedies through the grievance process and in June 2007 (with respect to the first complaint) and December 2007 (with respect to the second complaint), it advised Mr. Kniss that it would not deal with his complaints as they could be dealt with through another procedure available to Mr. Kniss, namely the grievance procedure. This option is available to the Commission by virtue of paragraph 41(1)(a) of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 (the Act) which provides as follows:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that:	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
	a) la victime présumée de l'acte

a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available.	discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

[36] A single arbitrator was appointed to hear Mr. Kniss' two grievances. Hearings began June 10, 2008 and continued sporadically over 7 days until September 2008. The arbitration award, some 55 pages in length, was handed down on July 23, 2009.

[37] The arbitrator found that Mr. Kniss was not wrongfully terminated and rejected his dismissal grievance. The question of the accommodation grievance was left open for a time but it was not pursued. The Union considered it to be moot since Mr. Kniss could not be reinstated, having failed in his grievance of his dismissal.

[38] Mr. Kniss was not prepared to accept this state of affairs and initiated a number of proceedings, as noted above. Of particular relevance is Mr. Kniss' complaint to the CIRB that the Union breached its duty of fair representation in its handling of his grievances.

[39] In dismissing Mr. Kniss' complaint, the CIRB acknowledged that the Union did not pursue the accommodation grievance but found that the latter's decision was not discriminatory, arbitrary or made in bad faith. The CIRB found that once the arbitrator upheld Mr. Kniss' termination, "there would be no purpose for the arbitrator to consider whether the complainant might be accommodated into the workplace in the future": Appeal Book, page 43.

[40] An application for reconsideration of the CIRB's decision was dismissed.

[41] In January 2011, Mr. Kniss returned to the CHRC and asked it to reactivate his complaints. The CHRC assigned the file to an analyst who conducted a detailed review of the arbitration award which, in light of the Commission's ultimate decision, it is useful to summarize here.

[42] The analyst framed her analysis in light of the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 (*Figliola*). She asked herself whether the issues in the arbitration process were essentially the same as the allegations in the human rights complaints and whether they were addressed at arbitration. She also asked herself if all the human rights issues were addressed in the arbitration and whether any of them were not addressed.

[43] The analyst reviewed the arbitrator's decision and noted a number of factual findings that bore directly on Mr. Kniss' human rights complaints, citing a number of passages from the arbitration award. In particular, she took note of the arbitrator's conclusion that:

> In finding a position...that met his experience and skill, and in obtaining an independent medical assessment from Dr. [...] that Mr. Kniss was medically fit to do the job, and in making accommodations for a sit/stand workstation, breaks and opportunity to move around, Telus met its duty accommodate with respect to that position.
>
> Appeal Book at p. 329.

[44] In substance, the analyst found that all of the allegations in Mr. Kniss' accommodation complaint were addressed in the arbitration award.

[45] The analyst also found that while the arbitration award did not deal directly with allegations of retaliation by failing to consider Mr. Kniss' candidacy for certain positions, it did deal with the major elements of his complaint:

> Given the facts as found by Arbitrator Elliott, the allegations of retaliation regarding the withdrawal of the STD [Short Term Disability] benefits and the termination of his employment do not appear to be based on a reasonably held belief [by Mr. Kniss]; they appear to be bald assertions. The entire fact scenario as interpreted by the Arbitrator shows that the complainant's STD benefits were discontinued because he failed to comply with the terms and conditions of the benefit program, that his conduct frustrated the employment contract, and that the respondent [Telus] had just cause to terminate his employment. The complainant's allegations of retaliation disregard all of the contextual facts bound by the Arbitrator.
>
> Appeal Book at page 330, paragraph 93

[46] The analyst concluded, as a result, that "Overall, all of the human rights allegations raised in the present complaints were considered and addressed by Arbitrator Elliott's decision": Appeal Book at page 331, paragraph 103.

[47] The analyst then considered, in keeping with the approach suggested in *Figliola*, whether the interests of justice required that the Commission deal with Mr. Kniss' complaints. The analyst's conclusions on this issue are particularly relevant to this appeal:

> Based on the above analysis, it appears that the substance of the present human rights complaints was dealt with overall at arbitration and that the complainant had the opportunity to address his human rights issues through this process. There appears to be no public interest in the Commission now dealing with the complaints. Furthermore, a decision not to deal with the present complaints would be in line with the Supreme Court of Canada's decision in *Figliola*.
>
> In addition, due to the Arbitrator's findings, it appears that pursuing the present complaints would not yield any practical result because they are unlikely to succeed.
>
> Appeal Book at page 332, paragraphs 105-106

[48] In light of these observations, the analyst recommended that the Commission not proceed with Mr. Kniss' complaints on the basis that, as provided in paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, the allegations of discrimination had been substantially dealt with in the arbitration process: Appeal Book at page 332, paragraph 112.

[49] Mr. Kniss was given the opportunity to review and to respond to the analyst's report before it was presented to the Commission. He took full advantage of this opportunity and submitted a very detailed response. Telus also submitted its comments on the analyst's report.

[50] In the end, the CHRC followed the analyst's recommendation and decided against proceeding with either of Mr. Kniss' complaints. It gave Mr. Kniss a written decision in which it explained that it was declining to proceed with his complaints pursuant to paragraph 41(1)(*d*) of the Act, which reads as follows:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41.** (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…	…
(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or	*d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

[51] Reading the analyst's report as a whole, I take the CHRC's reference to paragraph 41(1)(*d*) as a statement that since all of Mr. Kniss' human rights complaints were dealt with in the arbitration proceeding, his complaints to the Commission were, post-arbitration, either frivolous or vexatious. I do not believe that the CHRC was of the view that Mr. Kniss acted in bad faith.

[52] Mr. Kniss has the onus of showing that his application for judicial review is meritorious. He is not required to show that the CHRC decision was wrong or unreasonable, only that there are reasonable grounds to believe that he could be successful in his application.

[53] Mr. Kniss' principal argument before this Court was the apparent contradiction between the decision of the CIRB which held that his accommodation grievance was not dealt with by the arbitrator and the CHRC's conclusion that his accommodation grievance was substantially considered in the arbitration proceeding. There is no contradiction between the two decisions. It is conceded by all that the arbitrator did not dispose of the Mr. Kniss' accommodation grievance. The CHRC did not find otherwise. Given that both grievances arose out of a dispute as to how Mr. Kniss could be accommodated upon his return to work, Mr. Kniss' human rights issues were thoroughly canvassed in the dismissal grievance. The failure to deal specifically with the accommodation grievance does not alter this conclusion. This argument does not establish that Mr. Kniss' application is meritorious.

[54] Mr. Kniss' second argument is that the CHRC failed to consider his lengthy submissions in response to the analyst's report, since those submissions are not referred to in the CHRC's decision. Mr. Kniss' submissions are largely directed at showing that the arbitrator did not formally address his accommodation grievance. This is not disputed. There is no obligation on the CHRC to engage in a point by point rebuttal of submissions made in response to an analyst's or an investigator's report: see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. at paragraph 16.

[55] In my view, Mr. Kniss has not shown that his application is meritorious. The analyst's report was detailed and comprehensive and, on the basis of the material placed before us on this motion, supported by the facts. The CHRC's decision was supported by reasons which are consistent with the analyst's report. Mr. Kniss' arguments, when considered in the light of the whole of the record, fail to demonstrate that his application has a reasonable prospect of success.

[56] Given that this is a *de novo* review, I do not need to address the prothonotary's conclusion that Mr. Kniss' application for judicial review was an abuse of process. I would point out however that, before us, counsel for Telus conceded that Mr. Kniss' application for judicial review was the first time the reasonableness of the CHRC's decision was addressed. That issue was therefore not before the Alberta Courts in Mr. Kniss' application for judicial review of the arbitral award.

[57] Since Mr. Kniss has failed to satisfy the four part test in *Hennelly*, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree
David Stratas"

"I agree
D.G. Near"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-473-12
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CONCURRED IN BY:	STRATAS & NEAR J.J.A.
DATED:	DECEMBER 19, 2013

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