Federal Court		Cour fédérale

Date: 20090924

Docket: T-136-08

Citation: 2009 FC 960

Ottawa, Ontario, September 24, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

YURI BOIKO

Applicant

and

CHANDER GROVER

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Applicant pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 to appeal the reconsideration decision of Madam Prothonotary Tabib dated May 1, 2009.

[2] The Applicant had brought a motion dated March 16, 2009 under Rule 397(1) for reconsideration of Prothonotary Tabib's Order dated March 10, 2009 which was dismissed on May 1, 2009.

Factual Background

[3] The Applicant began his employment with the National Research Council (NRC) in November 2001 as a Research Officer in the Optics Group and his supervisor was Dr. Chander Grover. On July 17, 2004, the Applicant's employment was terminated by the NRC.

[4] On August 13, 2004, the Applicant filed a human rights complaint against the NRC (complaint #20041119) (which is the subject of an application for leave and judicial review in Court file T-137-08). In October 2004, the Applicant also filed a human rights complaint against the Respondent personally (complaint #20041427) (which is the subject of the present application for leave and judicial review).

[5] On December 21, 2007, pursuant to paragraph 44(3)b) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6, the Canadian Human Rights Commission (CHRC) dismissed the complaint because the evidence did not support the allegation that the Respondent harassed the Applicant based on his national origin. The Applicant filed for leave and judicial review of that decision on January 24, 2008, resulting in the within application.

[6] The Applicant's supporting affidavit sworn June 23, 2008 did not include the CHRC investigator's report of complaint #20041427 or the CHRC decision under review.

[7] The Applicant's proposed Memorandum of Fact and Law dated October 16, 2008 referred extensively to the CHRC investigation report #20041427, but the investigation report was omitted from the Application Record.

[8] On December 1, 2008, the Court ordered that the Applicant be allowed to include the CHRC investigation report #20041427 in his Application Record and on December 15, 2008, the Applicant filed his Application Record, which included CHRC investigation report #20041427.

[9] In his Memorandum of Fact and Law filed on February 2, 2009, the Respondent submitted that numerous statements and assertions of fact in the Applicant's Memorandum of Fact and Law dated October 16, 2008 were not supported by evidence in the record.

[10] On February 12, 2009, the Applicant filed a Motion Record seeking leave to file supplementary evidence with the Court from other proceedings, including a proceeding involving a complaint by another NRC employee against the Respondent, as well as a reference in the motion to CHRC investigation report #20041119, which concerns a human rights complaint filed by the Applicant against his employer, the NRC, but the proposed additional evidence was not included or explained in the brief Motion Record.

[11] On March 10, 2009, Prothonotary Tabib dismissed the motion, stating that the CHRC report relied upon was already included in the Applicant's Application Record. Prothonotary Tabib also refused the Applicant leave to file other new evidence on the following basis:

> In order for such a motion to be granted, the Applicant would have to satisfy the Court that the evidence he would then introduce was not previously available, would assist the Court in determining the issues before it, would serve the interest of justice, and would not cause prejudice to the responding party. None of these factors are addressed, let alone established in the Applicant's motion record. The Applicant's motion will therefore be dismissed.

[12] The Applicant brought a motion for reconsideration, arguing that the Prothonotary had erred by misapprehending the document he wished to include in the record. The Applicant was seeking to include CHRC investigation report #20041119, which related to his complaint against the NRC (Court file T-137-08) and not CHRC investigation report #20041427, which concerned the decision under review in the within application and was already in the record. The Applicant also sought to include new evidence in the reconsideration motion to explain why his original motion was deficient.

[13] On May 1, 2009, Prothonotary Tabib dismissed the Applicant's reconsideration motion. Prothonotary Tabib acknowledged that she misconstrued the Applicant's reference to the CHRC report but after reconsidering the matter, she concluded that this did not affect the result.

Arguments

[14] The Applicant argues that because the questions raised are vital to the final issue in this case and because the exercise of discretion by Prothonotary Tabib was based upon a misapprehension of the facts, the test for reviewing the decision of a prothonotary *de novo* on this appeal is met (*Canada v. Aqua-Gem Investment Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 (F.C.A.) (*Aqua-Gem Investments*

Ltd.), aff'd in *Z.I. Pompey Industrie v. EDU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (*Z.I. Pompey*); *Merck & Co. v. Apotex Inc.* 2003 FCA 488, [2004] 2 F.C.R. 459 at paragraph 19).

[15] The Applicant adds that he should be permitted to file a supplementary affidavit as per Rule 312, as it would meet the requirements established in *Larson-Radok v. Canada (M.N.R.)*, 2000 D.T.C. 6322, 97 A.C.W.S. (3d) 23.

[16] The Respondent submits that Rule 397(1) allows for the correction of certain mistakes made by the Court, but it is not intended to relieve against a mistake by a party that fails to bring a matter to the Court's attention (*Dupont Canada Inc. v. Canada*, 2002 FCA 307, 293 N.R. 178 at paragraph 10; *Abbud v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 223, 155 A.C.W.S. (3d) 939 at paragraph 10).

[17] The Respondent alleges that the inclusion of the documents would also cause significant prejudice to the Respondent, as it could potentially start the application process anew, requiring new affidavits and memoranda of argument and so on. The Applicant only brought this series of motions to introduce new evidence after potential flaws in his record were identified by the Respondent's Memorandum of Fact and Law.

Analysis

[18] The discretion of the Court to permit the filing of additional material should be exercised with great circumspection. A list of factors is enumerated in *Deigan v. Canada (Industry)*, (1999),

168 F.T.R. 277, [1999] F.C.J. No. 304 (QL) (Proth.) at paragraph 3, aff'd. (1999), 165 F.T.R. 121, 88 A.C.W.S. (3d) 288 (T.D.):

> The new Federal Court Rules allow the filing of a supplementary affidavit and of a supplementary record, however such should only be allowed in limited instances and special circumstances, for to do otherwise would not be in the spirit of judicial review proceedings, which are designed to obtain quick relief through a summary procedure. While the general test for such supplementary material is whether the additional material will serve the interests of justice, will assist the Court and will not seriously prejudice the other side, it is also important that any supplementary affidavit and supplementary record neither deal with material which could have been made available at an earlier date, nor unduly delay the proceedings.

[19] The appropriate test setting out the standard of review to be applied to discretionary orders of prothonotaries was established by the Federal Court of Appeal in *Aqua-Gem Investments Ltd.*, above. This test was later affirmed by the Supreme Court of Canada in *Z.I. Pompey*, above, and was subsequently reformulated in the following terms by the Federal Court of Appeal in *Merck Co. v. Apotex Inc.*, above at paragraph 19:

> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[20] After reviewing the evidence, the Court is of the view that the questions in the motion are not vital to the final issues. In her Order dated May 1, 2009, Prothonotary Tabib noted that when the Applicant filed his initial affidavit, he was clearly aware of the existence of the report he now seeks to introduce and of the grounds upon which he considers that report to be relevant.

Furthermore, she was not satisfied as to the alleged relevance and usefulness of the document in the context of the judicial review application. Moreover, Prothonotary Tabib was of the view that the Applicant's request was not in the interest of justice.

[21] The Court is not convinced that the CHRC investigation report #20041119, which deals with a separate human rights complaint, should be included as part of the judicial review application in relation to CHRC investigation report #20041427.

[22] Furthermore, the Applicant's explanations and arguments have not convinced the Court as to why the material was not introduced earlier and how it will serve the interest of justice, assist the Court and not seriously prejudice the other side at this juncture of the proceedings (*Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295, 292 N.R. 187 at paragraph 5).

[23] The Court finds no reason to conclude that Prothonotary Tabib's Order is clearly wrong or based on misapprehension of the facts involved in the case at Bar.

[24] The Applicant's motion is dismissed.

ORDER

THIS COURT ORDERS that the Applicant's motion be dismissed with costs. Costs in the form of a 500$ lump sum are payable to the Respondent within 20 days of the date of this Order.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-136-08
STYLE OF CAUSE:	YURI BOIKO v. DR. CHANDER P. GROVER
PLACE OF HEARING:	OTTAWA, Ontario
DATE OF HEARING:	September 22, 2009
REASONS FOR ORDER:	BOIVIN J.
DATED:	September 24, 2009

APPEARANCES:

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Mr. Paul Champ	FOR THE RESPONDENT

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