Federal Court of Appeal | Cour d'appel fédérale

Date: 20200925

Docket: A-50-19

Citation: 2020 FCA 149

CORAM: **WEBB J.A.**
WOODS J.A.
RIVOALEN J.A.

BETWEEN:

GARY CURTIS

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION and BANK OF NOVA SCOTIA

Respondents

Heard at Toronto, Ontario, on September 15, 2020.

Judgment delivered at Ottawa, Ontario, on September 25, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: WEBB J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] Gary Curtis (the appellant) appeals from an interlocutory order of the Federal Court (*per* Gleeson, J.) rendered on January 14, 2019 (2019 FC 43). The order under appeal dismissed the appellant's appeal of an interlocutory order of Prothonotary Aalto rendered on November 15, 2018 (T-1316-18).

I. Background

[2] To provide some context to these reasons it is useful to start with a brief review of some of the procedural history. The appellant was employed by the respondent Bank of Nova Scotia (the Bank) for several years in the 1990s and after an absence, for several years in the 2000s. The Bank and the appellant parted ways in 2013 and, as a result, the appellant launched several proceedings against the Bank. In April of 2013, the appellant filed a complaint with the respondent Canadian Human Rights Commission (the Commission) against the Bank, alleging adverse differential treatment and termination of employment based on race and colour contrary to section 7 of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6.

[3] In June of 2013, the appellant filed a complaint with Human Resources and Skills Development Canada for unjust dismissal against the Bank. The complaint before the Commission was held in abeyance with the consent of counsel for the appellant and the Bank to allow the unfolding of the adjudication procedures under the *Canada Labour Code,* R.S.C. 1985, c. L-2.

[4] In 2014, the appellant filed an action against the Bank in the Ontario Superior Court of Justice (CV-14-502628) relating to allegations of defamation and wrongful dismissal. In addition to these proceedings, the appellant filed an application for judicial review against the Bank in the Federal Court (T-1722-14).

[5] In April of 2017, despite the Bank's protest, the appellant asked the Commission to "reactivate" his complaint. The Bank objected because the proceeding before the Ontario Superior Court of Justice was still pending. In July of 2018, the appellant filed a notice of application with the Federal Court (T-1316-18) seeking an order in the nature of a writ of *mandamus* to compel the Commission to investigate his complaint and to compel the Commission to appoint a neutral party as an investigator. This originating document commenced the proceedings in which the interlocutory order is the subject of this appeal.

[6] In August of 2018, the Commission disclosed an investigation report pursuant to its normal procedures and invited submissions from the appellant and the Bank. Submissions were also sought on a supplementary report, but none were received.

[7] In October of 2018, motions for an interlocutory order were filed by the appellant and the Commission. The appellant moved that he be allowed to bring significant amendments to his application to add new forms of relief against the Bank and the Commission. In addition to this motion, the appellant was contemplating adding several new respondents and sought guidance from the Prothonotary on another amended application, yet to be filed and served. For its part, the Commission moved for an order allowing it to be removed as a respondent, pursuant to Rule 303(1)(*a*) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). The Prothonotary heard the motions on November 6, 2018, and November 13, 2018.

[8] On November 15, 2018, the Prothonotary rendered his decision allowing certain amendments to the application but disallowing those amendments involving relief against the

Bank proposed by the appellant, allowing the Commission to withdraw its motion without costs, ordering the assignment of a case management judge and awarding costs to the Bank in the amount of $1000 against the appellant. The appellant appealed the order to the Federal Court.

II. Interlocutory Order under Appeal

[9] On January 14, 2019, the Federal Court judge dismissed the appellant's motion in its entirety and awarded additional costs of $900 to the Bank against the appellant.

[10] On January 21, 2019, the appellant filed a notice of appeal with this Court, requesting that the Federal Court judge's interlocutory order of January 14, 2019, be set aside with costs in this Court and the Court below.

III. Standard of Review

[11] This Court's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, confirms that the standard of review applicable on appeals of discretionary decisions of the Federal Court is that articulated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. That is palpable and overriding error in respect of findings of fact and mixed fact and law, and correctness with respect to extricable questions of law. In order to be successful, the appellant must convince this Court that the Federal Court committed a palpable and overriding error in respect to a finding of fact, or a finding of mixed fact and law, or applied the law incorrectly.

[12] The Federal Court judge properly identified this standard at paragraph 2 of his reasons, and further stated that an award of costs is "quintessentially discretionary": *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 at para. 126 [*Nolan*]. Appellate courts should only interfere with costs awards on appeal if the Court below "made an error in principle or if the costs award is plainly wrong": *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271 at para. 247, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at para. 27.

IV. Appellant's Arguments and Analysis

[13] In the notice of appeal, the appellant framed his appeal as being limited to the costs awards. During his oral submissions before this Court, the appellant clarified that, along with the costs awards, he was asking this Court to set aside the interlocutory order, grant an order preserving certain documents and award costs in his favour against both respondents.

[14] The appellant advances several arguments in writing and orally. I will start with his arguments that focus on costs, summarized as follows.

[15] First, the appellant submits that the Federal Court judge erred when no costs were ordered in his favour when the Commission abandoned its motion. The appellant submits that the Federal Court judge erred in not granting costs to the appellant against the Commission and the Bank as they were "both unsuccessful in the motion of the CHRC [the Commission] attempting to remove themselves as a respondent." (Appellant's Memorandum of Fact and Law at para. 5 c)).

[16] Second, the appellant says that the Federal Court judge erred when he awarded costs to the Bank because "the applicant was successful in getting partial amendments and successful in defending the CHRC's [the Commission] motion to remove themselves as a respondent…" (Appellant's Memorandum of Fact and Law at para. 5 b)).

[17] Third, he argues that the Prothonotary and the Federal Court judge erred in not applying Rule 400(3)(*k*)(i) of the Rules which states that in exercising its discretion, when asked to order costs, the Court can consider whether any step in the proceeding was improper, vexatious or unnecessary. On this point, the appellant takes the position that the Commission should never have brought its motion to be removed as a respondent in the first place. He says that by bringing and abandoning its motion, which in the appellant's view was obviously going to fail, the Commission and the Bank wasted his time and money, and wasted the Court's time. He involved the Bank because it consented to the motion in the first place. He describes the motion as delaying the application from moving forward and being frivolous and vexatious. He says that there should have been costs awarded against the Commission and the Bank for losing the motion and prejudicing him.

[18] Fourth, the appellant argues that the Prothonotary's award of $1000 in costs in favour of the Bank is "totally abusive" and demonstrates that it is "plain and obvious that he is favouring the bank over this self-[represented] [*sic*] litigant". He submits that the entire "situation was the result of collusion and conspiracy" between the Bank and the Commission as they failed to investigate his complaint for six years until he tried to hold the Commission liable (Appellant's Memorandum of Fact and Law at para. 23 b)).

[19] I am of the view that the appellant's submissions on the costs awards have no merit. The Federal Court judge did not err when he exercised his discretion and decided not to interfere with the Prothonotary's costs award of $1000 against the appellant and not awarding costs to the appellant on the Commission's motion, nor did he err when he exercised his discretion and ordered additional costs of $900 against the appellant.

[20] The Federal Court judge considered these same arguments in paragraphs 4, 5, 7 and 8 of his reasons. The Federal Court judge did not err when he stated that the appellant failed to demonstrate any error of law or any palpable and overriding errors of fact or mixed fact and law.

[21] Contrary to the appellant's submissions before this Court that he was successful on his motion for amendments to the application, the Prothonotary, after patiently sifting through the issues with the parties, allowed only certain amendments to the pleadings involving relief against the Commission. The Prothonotary dismissed the appellant's request to amend the application to add multiple writs of *mandamus*, including one ordering the Bank to preserve and retain certain documents. The Bank was entirely successful in its opposition to the motion and sought costs against the appellant. The Prothonotary found that the amendments sought against the Bank were "clearly improper and the motion as against them should not have been brought", noting that the Bank's request for costs of $1000 was very reasonable in the circumstances (Prothonotary's decision at p. 4).

[22] In addition, the Commission was within its rights to abandon its motion to be removed as a respondent and, in light of Rule 402, the Prothonotary allowed the appellant to make

submissions as to costs. Again, contrary to the appellant's submission, the motion filed by the Commission to be removed as a respondent, and later withdrawn by the Commission at the invitation of the Prothonotary, was in no way frivolous, vexatious or destined to fail. The Commission was correct to be concerned about it being named as a respondent in the proceeding as it was the tribunal in respect of which the application was brought. The Prothonotary expressed his concerns over the need to have the Commission provide its position on the matter because of the nature of the relief being sought by the appellant, and in an effort to assist the Court, the Commission withdrew its motion.

[23] In light of Rule 402, the appellant was allowed the opportunity to provide his submissions on costs with respect to the Commission's abandonment of its motion. The Bank was not opposed to the Commission's motion nor of its abandonment, and did not seek costs against the Commission.

[24] The Federal Court judge was correct to find that Rule 400(1) clearly provides the Court with "full discretionary power over the amount and allocation of costs" and the Federal Court judge properly stated that "[c]osts are quintessentially discretionary" (Reasons at para. 5, citing *Alani v. Canada (Prime Minister)*, 2017 FCA 120, [2017] 279 A.C.W.S. (3d) 474 at para. 11, citing *Nolan*).

[25] In my view, the Federal Court judge committed no reviewable errors in not awarding costs to the appellant on the Commission's motion. There is no evidence whatsoever in the record before this Court to suggest that the Commission's motion "was deliberately done […] to

waste court time and costs, which prejudiced the appellant's application from proceeding by delaying the process" or that "the Commission and the [B]ank conspired in the frivolous motion of the [C]omission [*sic*], knowing that the [C]ommission was a proper respondent…" (Appellant's Memorandum of Fact and Law at paras. 22, 24).

[26] Before this Court, the appellant has also failed to demonstrate any palpable and overriding error of fact or mixed fact and law with respect to the amount and allocation of costs against him.

[27] Turning to the next argument, the appellant alleges the Federal Court judge and the Prothonotary committed an "error of fact" when they failed to consider the import of a letter from counsel for the Bank to the appellant dated July 26, 2018. The appellant submits that the letter is proof of the Bank admitting it destroyed relevant documents, hence the need for this Court to set aside the interlocutory order, and order that the Bank preserve his employee records.

[28] The letter states: "The Bank no longer is in possession of your employee file for the period 1991 to 1997. As has been communicated to you several times, it is our belief that it was destroyed in accordance with the Bank's document retention policy long before this action was commenced." The letter later states: "With respect to your employee file for the period 2000 to 2012, copies of all documents contained in that file have been produced" (Appeal Book, Tab 6 at p. 308).

[29] This argument must also fail. The Federal Court judge made no reviewable error. The Prothonotary was alive to this letter and considered it when he denied the appellant's request to amend the application to include an order preserving documents. The appellant has failed to point to anything in the reasons rendered by the Federal Court judge or the Prothonotary that is remotely close to a palpable and overriding error of fact.

[30] Finally, the appellant argues that he was not treated fairly during the process, and as a self-represented litigant, he is entitled to more assistance.

[31] A review of the transcripts of the proceedings before the Prothonotary and the Federal Court judge fails to disclose anything resembling unfairness in the manner in which the appellant was treated by the Court. The Prothonotary patiently guided the appellant when he attempted to introduce a new form of proposed amended notice of application to add new parties, which with the Court's assistance, he ended up abandoning. The Prothonotary heard the appellant's submissions on costs in connection with the Commission abandoning its motion. Similarly, the Federal Court judge respectfully and patiently allowed the appellant to present his oral submissions. The appellant simply does not agree with the orders rendered by the Federal Court. He is not entitled to special treatment because he is self-represented. He is entitled to be heard in a respectful manner and to have his submissions considered based on the record before the Federal Court. That is exactly what happened before both the Prothonotary and the Federal Court judge.

V. Conclusion

[32] In conclusion, the appellant's appeal has no merit and should be dismissed.

[33] At the hearing before this Court, the Commission withdrew its written request for costs of $1500. The Commission is a public interest litigant and as such, rarely asks for costs and usually requests that no costs be ordered against it. The appellant's allegations of conspiracy between the Commission and the Bank are gratuitous and vexatious. Had the Commission not withdrawn its request for costs, I would be inclined to award costs in its favour in this case.

[34] The Bank is seeking costs in the amount of $1500. This amount is in line with the Tariff and very reasonable in the circumstances I have outlined above.

[35] For these reasons, I would dismiss the appellant's appeal with costs of $1500 awarded to the Bank.

"Marianne Rivoalen"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	GARY CURTIS v. CANADIAN HUMAN RIGHTS COMMISSION AND BANK OF NOVA SCOTIA
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CONCURRED IN BY:	WEBB J.A. WOODS J.A.
DATED:	SEPTEMBER 25, 2020

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