Federal Court of Appeal | Cour d'appel fédérale

Date: 20210628

Docket: A-378-19

Citation: 2021 FCA 125

CORAM: **STRATAS J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

GABRIEL FONO

Appellant

and

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

Heard by online video conference hosted by the registry on June 28, 2021.

Judgment delivered from the Bench at Ottawa, Ontario, on June 28, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210628

Docket: A-378-19

Citation: 2021 FCA 125

CORAM: **STRATAS J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

GABRIEL FONO

Appellant

and

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 28, 2021).

GLEASON J.A.

[1] This appeal arises in the context of an application for judicial review from a decision of an adjudicator appointed under Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 in which the adjudicator declined to award reinstatement following the respondent's admission that the appellant had been unjustly dismissed.

[2] In the judicial review proceedings before the Federal Court, the respondent brought a motion to strike certain paragraphs from the Notice of Application and the appellant's affidavit that the respondent alleged violated settlement privilege. The respondent also brought a second motion for an order striking additional paragraphs in the Notice of Application. In the context of the latter motion, the appellant agreed that certain paragraphs should be struck and sought to amend other paragraphs in the Notice of Application to request an order from the Federal Court reinstating him to his former position with the respondent or, alternatively, directing the CEO of the respondent to "do everything in his power to reinstate [the appellant] to a different position consistent with his accommodation request and the law".

[3] In an unreported decision dated September 5, 2018 (*Fono v. Canada Mortgage and Housing Corporation*, in File T-2060-17, reasons for which are found at pp. 4532-4550 of the Appeal Book, Vol. 17), Prothonotary Aylen granted the motions and struck the impugned paragraphs in the Notice of Application and affidavit. The Prothonotary held that the paragraphs challenged on the ground of privilege were improper because they violated settlement privilege as they referred to communications made during the agreed-upon mediation session held prior to the adjudication or referred to without prejudice settlement offers subsequently made by the respondent. Insofar as concerns the other impugned paragraphs, the Prothonotary found that, as set out in the appellant's proposed amended pleading, they were improper as they did not relate to the decision made by the Adjudicator. The Prothonotary therefore refused the amendments the appellant sought. However, the Prothonotary left open the possibility that the appellant could seek leave to amend his Notice of Application to request similar relief if he formulated the relief in a different fashion to tie it more directly to the adjudicator's decision to refuse reinstatement.

[4] The appellant appealed the Prothonotary's order to the Federal Court and in a decision reported as *Fono v. Canada Mortgage and Housing Corporation*, 2019 FC 1190 (*per* St-Louis, J.), the Federal Court dismissed the appeal. It held that the Prothonotary did not err in concluding that settlement privilege precluded the evidence and allegations regarding what transpired during the mediation and concerning settlement offers or in concluding that the proposed amendments directed to remedy were improper. On the latter point, in reliance on this Court's decision in *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, [2020] 1 F.C.R. 231 [*Fisher-Tennant*], the Federal Court Judge noted that an order seeking direct substitution of a remedy is only available where there is only one reasonable outcome so that returning the matter to the adjudicator would be pointless. Because the appellant had set out no basis in his pleadings as to why reinstatement was the only available remedy, and because assessment of the appropriateness of reinstatement is "multifactorial and inherently discretionary", the Federal Court Judge found that the Prothonotary did not err in refusing the proposed amendments to the Notice of Application.

[5] The appellant now appeals to this Court.

[6] In this appeal, this Court can intervene only if the Federal Court made an error of law or a palpable and overriding error of fact or mixed fact and law in its disposition of the appeal from the Prothonotary's order. While we do not endorse all of the reasons given by the Federal Court, and in particular disagree with paragraph 35 of its reasons, we see no such error.

[7] The paragraphs struck from the Notice of Application and the affidavit on the basis of settlement privilege were properly struck as there was more than ample basis for the Prothonotary to have concluded that they referred to settlement offers or to comments made during a confidential, privileged mediation session. Contrary to what the appellant asserts, the respondent did not waive the privilege that attached to those statements and there is no exception that would allow them to be referred to in the judicial review application. In this regard, it was open to the Prothonotary to find the exception which allows offers to be filed to prove a settlement agreement was inapplicable in light of the fact that the parties proceeded with the hearing before the adjudicator, during which the appellant was represented by counsel.

[8] The law protects these sorts of communications from disclosure in the event the case does not settle in order to foster open and frank settlement discussions. Were this not the case, employers or former employers might well be loath to suggest settlement compromises if their offers could be used against them if a settlement were not achieved.

[9] Further, it is common for labour adjudicators or arbitrators who conduct consensual mediation sessions prior to hearing a case to express tentative views during the mediation as to the potential strengths or weaknesses of parties' positons with a view to fostering settlement, especially where, as was the case here, the parties are represented by experienced counsel. Such statements are not indicative of bias. See for example *Skinner v. Fedex Ground Ltd.*, 2014 FC 426, 453 F.T.R. 315, at paras 7-10; *Santa Fe Masonry v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2006 CarswellOnt 8141, [2006] O.J. No. 5099 (QL) (Ont Super Ct J (Div Ct)) at paras 4-10; Richard J. Charney and Thomas E. F. Brady, *Judicial Review in Labour*

Law (Thomson Reuters) (e-looseleaf updated 2021, release 1) ch. 11 at 11.1100-11.1120. By analogy with mediation/arbitration in the family law context, see also *Reilly v. Zacharuk*, 2017 ONSC 7216, 2017 CarswellOnt 19316, at paras 67-72.

[10] It would have a chilling effect on employment and labour mediations and undercut their efficacy if statements such as those the appellant alleges were made by the adjudicator were to be placed before the courts. The comments impugned by the appellant merely reflect the adjudicator's tentative views as to the strength of the offer made by the respondent as compared to risks associated with pursuing the adjudication. This sort of comment is standard fare in a mediation. The Federal Court therefore did not err in declining to interfere with the Prothonotary's order striking the impugned paragraphs on the basis of settlement privilege.

[11] The Federal Court likewise did not err in declining to interfere with the Prothonotary's refusal to allow the appellant to amend his Notice of Application to request the Federal Court to order reinstatement or that the respondent be ordered to undertake a job search. In accordance with the decision of this Court in *Fisher-Tennant*, when considering the merits of the judicial review application, the Federal Court could not itself order reinstatement or such a job search unless the Court were satisfied that it was the only possible result.

[12] It was open to the Prothonotary to have concluded that the appellant had not adequately framed his pleadings to request such a result. Moreover, the Prothonotary held that the appellant had leave to amend his Notice of Application to request this remedy, if he focussed his requests more directly on the adjudicator's decision.

[13] Given the issues before the adjudicator, such amendment could either seek direct substitution of the remedy, or perhaps more appropriately, would seek to have the Federal Court issue relief in the nature of *mandamus* or a directory order, requiring the adjudicator to make the orders the appellant seeks. While such relief is unusual, it is open in appropriate cases in judicial review applications (see for example *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at paras 139-142; *Fisher-Tennant*, at paras 66-90; *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, 48 Admin. L.R. (6th) 71, at paras 69-70; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras 14-21; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93, at paras 13-15).

[14] As the Prothonotary left this possibility open – albeit with leave – the Prothonotary did not err in law in her order. It was similarly open to the Prothonotary to have required the appellant to obtain leave before making such an amendment, due to the difficulties with the pleadings encountered previously. The Federal Court therefore did not err in declining to set aside the Prothonotary's decision to refuse the proposed amendments or to impose a leave requirement.

[15] The appellant also says that the Federal Court erred in declining to allow him to resile from the agreements he made regarding portions of his Notice of Application that he agreed should be struck and in awarding costs. There is no merit in either assertion. There is no evidence that the appellant lacked the capacity to make the agreements he made during the hearing before the Prothonotary or that he was somehow coerced into making them.

[16] As for costs, the appellant has a pecuniary interest in the judicial review application and thus is not a public interest litigant. He accordingly cannot seek to be shielded from a costs award as a public interest litigant. Costs awards are discretionary. There is no basis to interfere with the awards below as costs typically follow the event and the appellant was unsuccessful before both the Prothonotary and the Federal Court judge.

[17] As the appellant is likewise unsuccessful in this appeal, it will be dismissed, with costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-378-19
STYLE OF CAUSE:	GABRIEL FONO v. CANADA MORTGAGE AND HOUSING CORPORATION
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	JUNE 28, 2021
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. GLEASON J.A. LEBLANC J.A.
DELIVERED FROM THE BENCH BY:	GLEASON J.A.

APPEARANCES:

Gabriel Fono	FOR THE APPELLANT
Christopher Rootham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP	FOR THE RESPONDENT