Federal Court  Cour fédérale

Date: 20170103

Docket: 16-T-37

Citation: 2017 FC 2

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

JEFF MACDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

and

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant Mr. Jeff MacDonald is a first-time offender serving a life sentence for a crime committed in 1987. He is currently incarcerated at Bath Institution [Bath], a medium-

security correctional facility located in Ontario. Mr. MacDonald is seeking to challenge, by way of an application for judicial review, a decision of the Canadian Human Rights Commission [the Commission] rejecting the complaint he had filed against the respondent the Commissioner of the Correctional Service of Canada [CSC]. In his complaint, Mr. MacDonald was alleging that CSC differentiated adversely against him based on disability (a post-traumatic stress disorder) by omitting to provide him with single cell accommodation at a minimum-security institution, and that he was therefore arbitrarily detained at a security level higher than required.

[2] The Commission's decision dismissing Mr. MacDonald's complaint was rendered several months ago on April 12, 2016, and the 30-day time limit set by section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act] to file an application for judicial review has long expired. In a motion in writing filed on October 25, 2016 under Rule 369 of the *Federal Courts Rules*, SOR/98-106, Mr. MacDonald is asking this Court to grant him an extension of the time within which to serve and file his notice of application for the judicial review of the Commission's decision. On behalf of the respondents, the Attorney General of Canada [AGC] opposes the extension.

[3] The sole issue to be determined by this Court is whether Mr. MacDonald's motion for an extension of time should be granted. For the reasons that follow, while I sympathize with Mr. MacDonald's challenges in bringing his application before the Court, I must dismiss the motion. Having considered the evidence submitted by Mr. MacDonald and the Commission's decision, I cannot conclude that Mr. MacDonald has satisfied the established requirements to obtain an extension of time or that, in the circumstances of this case, it would be in the interests of justice

to exercise my discretion to grant the extension sought.

II. Background

[4] On January 27, 2016, the Commission provided its investigation report into Mr. MacDonald's complaint. This comprehensive 94-paragraph report constitutes the basis for the Commission's reasons. The report concluded that CSC did not deny access to services to Mr. MacDonald or differentiate adversely against him in the provision of services. More specifically, the investigator's report noted that Mr. MacDonald was currently residing in a single cell accommodation at Bath, and that CSC had provided him with single cell accommodation for the majority of his sentence, in line with his accommodation needs resulting from his mental health issues. The investigator further underlined that, at the time of the inquiry into a possible transfer to a minimum-security institution in 2012, Mr. MacDonald's Offender Security Level was then classified as medium, rendering him ineligible to transfer to such a minimum-security facility at that point in time.

[5] The investigator also concluded, based on the evidence provided, that Mr. MacDonald had not co-operated with CSC since 2013 with regard to his potential transfer and to the opportunities available to him. Finally, the investigator observed that CSC had turned its mind to Mr. MacDonald's disability and had taken several steps to try and ease his resistance to transfer. These efforts included providing additional psychological support, creating a process to help him absorb the idea of a transfer to a minimum-security institution, and suggesting changes to his current living arrangements.

[6] The investigator thus recommended that the Commission dismiss Mr. MacDonald's complaint on the basis that, having regard to all the circumstances, a further inquiry into the complaint by the Canadian Human Rights Tribunal [the Tribunal] under the *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHR Act] was not warranted.

[7] On April 12, 2016, further to its review of the investigation report and the parties' comments on the report, the Commission adopted its investigator's recommendation. Pursuant to subparagraph 44(3)(b)(i) of the CHR Act, the Commission thus dismissed Mr. MacDonald's complaint because no further inquiry was warranted. Accordingly, Mr. MacDonald's file was closed.

III. Analysis

[8] Determining whether a motion for an extension of time should be granted involves an exercise of discretion which must be guided by four criteria identified by the Federal Court of Appeal (*Chan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 130 at para 4; *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*] at para 61; *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (QL) (FCA) [*Hennelly*] at para 3). These four factors are: (i) did Mr. MacDonald have a continuing intention to pursue his application for judicial review? ; (ii) is there some potential merit to his application? ; (iii) is there prejudice to the AGC or CSC arising from the delay? ; and (iv) does a reasonable explanation for the delay exist?. Mr. MacDonald bears the burden of establishing these elements (*Virdi v Canada (Minister of National Revenue)*, 2006 FCA 38 at para 2).

[9] The AGC concedes that the delay has not subjected the respondents to any prejudice. However, the AGC argues that Mr. MacDonald has failed to provide evidence in support of the three other *Hennelly* factors, namely his continuing intention to contest the Commission's decision, that a judicial review of the Commission's decision has a reasonable chance of success, and that he had reasonable explanations for the delay of more than six months elapsed between the Commission's decision and his notice of motion.

[10] I agree with the AGC.

[11] I acknowledge that the test developed by the Federal Court of Appeal must be applied with some flexibility to ensure that justice is done between the parties. This implies that the weight to be assigned to each of the four *Hennelly* factors will vary depending upon the circumstances of each case. "It also means that the power to grant an extension of time remains discretionary in nature, and the four factors, while providing a framework for the exercise, are not intended to fetter it" (*Berrada v WestJet*, 2015 FC 539 [*Berrada*] at para 12). In fact, the four criteria guiding the Court need not all be resolved in favour of Mr. MacDonald. At the end of the day, the overriding consideration in the exercise of the Court's discretion is "that the interests of justice be served" (*Larkman* at paras 62 and 85).

[12] However, I am not persuaded that this is a situation where I should exercise my discretion in favour of Mr. MacDonald and where the interests of justice would be served by an extension of time, as there is insufficient evidence to satisfy three of the factors guiding the exercise of my discretion. More particularly, in his notice of motion, Mr. MacDonald remains silent on his

intention to challenge the Commission's decision, he does not offer grounds or arguments showing any likelihood of success in his eventual application for judicial review, and he only provides some unsatisfactory explanations for his delay in making his application.

A. *There is no evidence of continuing intention*

[13] The first factor requires Mr. MacDonald to demonstrate a continuing intention to pursue his application for judicial review for the entire period expired since the Commission's decision, both prior to the 30-day statutory time limit and after it.

[14] On this front, Mr. MacDonald makes no submissions nor does he provide evidence in his affidavit on his intention to challenge the Commission's decision, whether before or after the statutory timeframe. The only oblique reference to this element can perhaps be drawn from Mr. MacDonald's repeated complaints about the fact that he was not provided with certain 2011-2012 emails exchanged between his case management team and three minimum-security correctional institutions. However, these attempts for access to certain documents, in the absence of any other evidence regarding Mr. MacDonald's intention, do not constitute, in my view, sufficient evidence of a continuing intention to seek a judicial review of the Commission's decision.

[15] Furthermore, Mr. MacDonald had started his quest to obtain these documents before the issuance of the Commission's decision. In addition, further to my review of the Commission's decision, I am satisfied that the evidence relating to the possible transfers of Mr. MacDonald to

the minimum-security institutions in 2012 was in any event before the investigator and was properly considered by the investigator in the report.

[16] Stated otherwise, however generous I could be in my reading of Mr. MacDonald's representations, I cannot detect a sufficient indication that he had the required continuing intention to challenge the Commission's decision after its issuance on April 12, 2016. The history of delay instead reflects a lack of intention by Mr. MacDonald to proceed with his application.

B. ***The application has no potential chance of success***

[17] Litigants seeking an extension of time must also establish that the application for which the extension is sought has some merit and a reasonable chance of success (*LeBlanc v National Bank of Canada*, [1994] 1 FCR 81). This is the second *Hennelly* factor. This does not require Mr. MacDonald to convince the Court that his application for judicial review will necessarily succeed; however, he must do more than merely state that the decision he wishes to challenge has no merit or repeat the story and the factual allegations he has presented before the Commission.

[18] I pause to note that, in this case, Mr. MacDonald has not yet filed a draft notice of application for judicial review nor has he developed, in his written submissions and his notice of motion, the reasons and arguments underlying his intended application. It leaves the Court with very limited or no information at all on the basis upon which it is possible to assess the merits of

his case, or the specific grounds supporting the challenge that Mr. MacDonald wishes to bring against the Commission's decision.

[19] Again, the only indirect reference to this factor in Mr. MacDonald's affidavit is his concerns about the missing emails, which he describes as being "crucial evidence, […] fundamental to establishing the underlying factual allegation of discrimination" in his complaint to the Commission. Mr. MacDonald has provided no subsequent material that would enable the Court to make an assessment of whether his application has any merit.

[20] The judicial review contemplated by Mr. MacDonald arises in a context where the Commission is recognized as a specialized administrative tribunal enjoying a large amount of deference by the courts (*Berrada* at paras 23-24). It is well established that the applicable standard of review for decisions of such a tribunal is reasonableness, given that the findings of the Commission involve questions of fact and of mixed fact and law. Moreover, because of its highly specialized nature and its particular expertise in the sphere of human rights where it routinely renders decisions, the Commission is entitled to a high degree of deference (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 13).

[21] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Under a reasonableness standard, as

long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland Nurses* at para 17). On a reasonableness review, it is not for the courts to reweigh the evidence considered by the administrative tribunal (*Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 30; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64).

[22] In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton*], the Supreme Court has again recently restated the principle : "[t]he presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer" (*Edmonton* at para 33).

[23] I find no evidence allowing me to conclude that the challenge Mr. MacDonald is planning to bring in this case could meet this test of unreasonableness. A summary review of the Commission's decision suffices to demonstrate that the decision is reasonable and falls within the range of possible, acceptable outcomes, and that Mr. MacDonald does not have an arguable case. The investigator's report is thorough and reviewed all the evidence before the Commission. The fact that Mr. MacDonald may disagree with the investigator's assessment or with the findings of the Commission is not enough to render the decision unreasonable and to put it outside the scope of possible, acceptable outcomes (*Maqsood v Canada (Attorney General)*,

2011 FCA 309 at para 15). I instead conclude that Mr. MacDonald is not likely to succeed in his application, as the potential allegations of reviewable errors are answered on the face of the Commission's decision.

[24] As Mr. Justice LeBlanc explained in *Berrada* at para 22, the CHR Act "sets out a complete mechanism for dealing with human rights complaints, and the Commission is central to this mechanism (*Cooper v Canada (HRC)*, [1996] 3 SCR 854 at para 48)". After receiving a complaint, the Commission appoints an investigator to investigate and prepare a report of its findings for the Commission. When it receives the investigator's report, the Commission then provides copies to the parties and invites them to comment on it. It then reviews the report and the parties' comments and makes a decision, which includes the possibility of dismissing the complaint if it does not believe that an inquiry by the Tribunal is warranted. This is what happened here.

[25] Neither Mr. MacDonald's affidavit nor his written submissions reveal the existence of any argument allowing to conclude to the unreasonableness of the Commission's decision. Mr. MacDonald has not established that his application for judicial review has merit.

C. ***No reasonable explanation for the delay exists***

[26] I am also not convinced that there is a reasonable explanation for Mr. MacDonald's delay in filing his motion for an extension of time and his failure to do so for more than six months. The reasons invoked by Mr. MacDonald are the fact that he has no education, that he is unfamiliar with the Court's proceedings, that he is not represented by legal counsel and that he

has inadequate access to computers, photocopies and other resources in his correctional institution.

[27] I note that Mr. MacDonald does not allege that he did not receive communication of the Commission's decision around the time when it was issued on April 12, 2016. Nor does he indicate or imply that he was not provided with the investigator's report in January 2016.

[28] It has been repeatedly recognized that initiating judicial reviews of decisions of administrative tribunals within the relatively short time limits prescribed by the Act reflects the public interest in the finality of administrative decisions (*Canada v Berhad*, 2005 FCA 267 [*Berhad*] at para 60; *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 24). This time limit is "not whimsical" and exists "in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay" (*Berhad* at para 60).

[29] The fact that Mr. MacDonald is self-represented does not justify a departure from the applicable legal principles. Litigants who choose to represent themselves must accept the consequences of their choice (*Wagg v Canada*, 2003 FCA 303 at para 25). This is not to say that the Court cannot provide some assistance to an unrepresented litigant like Mr. MacDonald or factor his lack of experience or legal training in its assessment. However, the Court cannot abandon the rule of law and ignore the legal precedents it is bound to apply.

[30] The law is the same for all litigants and does not vary because a litigant chooses to represent himself or herself (*Cotirta v Missinnipi Airways*, 2012 FC 1262 [*Cotirta*] at para 13, affirmed 2013 FCA 280). In my review of Mr. MacDonald's submissions, I have considered the fact that Mr. MacDonald is self-represented and in a correctional facility, and I kept that in mind in assessing his position. However, these considerations cannot give any additional rights or an exemption to Mr. MacDonald, nor do they put him in a special category of litigants (*Nowoselsky v Canada (Treasury Board)*, 2004 FCA 418 at para 8). Being self-represented does not insulate an applicant from the application of the law. Not having the benefit of professional legal advice does not excuse a failure to comply with the Rules.

[31] Stated differently, exercising my discretion in favour of Mr. MacDonald would require me to ignore the test articulated by the Federal Court of Appeal for an extension of time, and to remain blind to the absence of evidence supporting the *Hennelly* factors in this case. This, I cannot do. The rule of law rests upon the cardinal principles of certainty and predictability. An exercise of discretion must find its source in the law, and it cannot be a proper or judicious one if it becomes a licence for non-compliance with the applicable law.

[32] As stated by Justice Gagné in *Cotirta*, "[t]he jurisprudence consistently refuses to consider a party's lack of legal training or understanding of the Rules as constituting a reasonable justification for delay" (*Cotirta* at para 13). Therefore, Mr. MacDonald's alleged lack of knowledge of the procedural issues and his inability to pay legal counsel cannot serve to rescue his motion. I am also not persuaded that Mr. MacDonald's more difficult access to

computers, photocopies and other resources in his correctional facility institution are enough to amount to a reasonable explanation for his delay in filing his application.

[33] Mr. MacDonald further asks for the assistance from the Court in relation to the Court's process and procedures and to the preparation of his application for judicial review. In support of his request, Mr. MacDonald refers to his functional limitations and mental illness, his vulnerability, his Grade 9 education, his inability to make copies or meet the time frames or formats required by the Court, and the fact that he cannot afford to pay for legal representation. The Court cannot accede to this request either as it is not the Court's role to provide legal advice to litigants.

IV. Conclusion

[34] Mr. MacDonald has not provided the required evidence to allow me to exercise my discretion in his favour and to relieve him of his failure to submit his application for judicial review within the time frame provided in the Act. In these circumstances, I am not persuaded that justice will be served by granting the extension of time sought by Mr. MacDonald. The motion for an extension of time will therefore be dismissed, but without costs to Mr. MacDonald.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion for an extension of time is dismissed.

2. No costs are awarded.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	16-T-37
STYLE OF CAUSE:	JEFF MACDONALD V ATTORNEY GENERAL OF CANADA AND THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	GASCON J.
DATED:	January 3, 2017

WRITTEN REPRESENTATIONS BY:

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Mary Roberts	FOR THE RESPONDENTS

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