

Federal Court



Cour fédérale

Date: 20230713

Docket: T-321-22

Citation: 2023 FC 959

Ottawa, Ontario, July 13, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

DAMON ATWOOD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Corporal Damon Atwood, asked to file an additional affidavit after already filing his evidence in the underlying judicial review application. An Associate Judge of this Court, who is case-managing the application, considered Mr. Atwood's request and dismissed it, finding the additional affidavit not relevant to the issues raised in the underlying judicial review and not of assistance to the Court.

[2] Mr. Atwood appealed the Case Management Judge's determination. I am deciding this appeal.

[3] Mr. Atwood argues that the Case Management Judge erred in law because she determined the relevance of the affidavit by considering the remedies sought in the underlying judicial review instead of more broadly considering the issues raised by the judicial review. I do not agree. As I explain below, I find this argument formalistic with no impact on the result in this context, where the Court is tasked with considering a number of factors. Given the fact-based discretionary decision at issue, I see no basis to disturb the Case Management Judge's decision to dismiss Mr. Atwood's request.

[4] Based on the reasons below, I dismiss the appeal.

II. Procedural History

[5] In the underlying judicial review, Mr. Atwood is challenging the decision to deny him access to past decisions rendered by adjudicators in the grievance process of the Royal Canadian Mounted Police [RCMP].

[6] After Mr. Atwood served his affidavit under Rule 306 of the *Federal Courts Rules*, he became aware of this Court's decision in *Stentaford v Canada (Attorney General)*, 2022 FC 1450, a judicial review of a decision of the Commissioner of the RCMP to deny treatment expenses for in vitro fertilization [IVF]. Mr. Atwood obtained from the Federal Court Registry a copy of an affidavit sworn by Rebecca Morin, an employee in the Office for the Coordination of

Grievances and Appeals of the RCMP, and filed by the respondent in *Stentaford*. The Morin affidavit provides information on the RCMP grievance system and encloses as exhibits several RCMP grievance decisions relating to IVF expenses.

[7] Mr. Atwood notified the Respondent of his intent to produce the Morin affidavit as evidence, which the Respondent opposed. Mr. Atwood then filed a formal motion asking the Court to admit the additional affidavit under Rule 312. This motion was dealt with in writing and dismissed by the Case Management Judge on January 6, 2023.

III. Issue and Standard of Review

[8] The sole issue on this appeal is whether the Court should set aside the Case Management Judge's determination to not admit the affidavit because it was not relevant.

[9] On a Rule 51 appeal, I must review the decision of the Case Management Judge on a standard of palpable and overriding error for questions of fact and questions of mixed fact and law, except where there is an extricable legal principle at issue and then, like on any question of law, the standard is correctness (*Housen v Nikolaisen*, 2002 SCC 33; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64, 66).

[10] The Case Management Judge's determination on relevance is a question of mixed fact and law. The parties disagree on whether an extricable legal principle is at issue. Mr. Atwood argues that the Case Management Judge got the legal test wrong when she only considered the remedies sought in the underlying judicial review to determine relevance of the affidavit.

[11] I need not decide whether an extricable legal principle is at issue because on any standard I do not find that there is a basis to overturn the Case Management Judge's decision.

IV. Relevance Determination

[12] Mr. Atwood argues that the Case Management Judge got the legal test wrong on the threshold issue of whether the affidavit is relevant to the issues on judicial review. Instead of focusing on the issues raised in the Notice of Application, he argues the Case Management Judge only considered the remedies sought. I find this to be an overly formalistic argument in the context of a discretionary decision that considers a number of factors. Mr. Atwood's argument is not that the Case Management Judge was not permitted to consider the remedies being sought, but essentially that she did so at the wrong step of the analysis.

[13] Mr. Atwood does not argue that the Case Management Judge failed to articulate the appropriate test in considering whether to admit an additional affidavit under Rule 312. There is no dispute that she cited the applicable test and jurisprudence.

[14] On a Rule 312 motion, the Court considers whether two preliminary requirements are met, namely: i) that the additional affidavit is relevant to an issue before the Court; and ii) that the affidavit is admissible. Assuming these preliminary requirements are met, other factors the Court considers are:

- (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
- (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
- (c) Will the evidence cause substantial or serious prejudice to the other party? (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 at paras 4-6 [*Forest Ethics*])

[15] I agree with Mr. Atwood that focusing solely on the remedies sought in the underlying application is too narrow a framing to determine relevance at the preliminary threshold stage. I agree that, generally, this preliminary review is concerned with ensuring that the new evidence does not raise a new issue not contemplated in the underlying application for judicial review (*Forest Ethics* at para 4; *Campbell v Electoral Canada*, 2008 FC 1080 at para 35).

[16] The grounds on which Mr. Atwood asserts that he is relying on the affidavit were raised in his Notice of Application, including: whether the ongoing withholding of grievance decisions violates the open court principle, section 2(b) of the *Charter*, and the principles of procedural fairness. These issues are properly before the Court.

[17] While I agree that it is overly restrictive to determine relevance at the preliminary stage by only considering the remedies sought in the underlying judicial review, I do not find this to be a sufficient basis to overturn the Case Management Judge's determination. Ultimately, the

decision to admit additional evidence is a fact-based, discretionary one where the Court can consider and weigh a number of factors (*Havi Global Solutions LLC v IS Container PTE Ltd*, 2020 FC 803 at paras 45-46; *Campbell* at para 27; *Forest Ethics* at paras 4-5). As noted by the Case Management Judge, “the jurisprudence does not prescribe how they [the factors] are to be weighed by the Court.”

[18] One of the factors commonly considered in Rule 312 motions is whether the additional evidence would assist the court in determining the issues in the underlying judicial review. This too is a form of relevance determination. As stated above, by the Federal Court of Appeal in the *Forest Ethics* decision, one question is “will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?” (*Forest Ethics* at para 6).

[19] The Case Management Judge’s relevance determination is supported by the record and her reasons. The Case Management Judge considered the issues raised in the underlying application, noting the same issues that Mr. Atwood argued on this appeal. She also noted the specific remedies Mr. Atwood is seeking, and found the additional affidavit would not be of assistance to the Court in determining the application. She specifically found that Mr. Atwood had not shown that there was anything in the affidavit that would assist the Court in addressing whether there is a public duty to create a database or to disclose adjudicator decisions, nor in addressing the legal argument that portions of the RCMP’s Administrative Manual are *ultra vires* section 31 of the *Royal Canadian Mounted Police Act*.

[20] The Case Management Judge also noted that admitting the affidavit would not be consonant with Rule 3, an overarching consideration in these requests, that the *Rules* be interpreted and applied so as to secure the just, most expeditious, and least expensive determination of every proceeding on its merits.

[21] I have considered the two bases on which Mr. Atwood has argued the affidavit would assist the Court. I am not persuaded, considering these arguments, that the Case Management Judge made a palpable and overriding error or any legal error.

[22] First, Mr. Atwood argues that the description of the grievance process assists in establishing the quasi-judicial nature of those proceedings, which is required to demonstrate that the open court principle applies. I agree with the Respondent that other material before the Court explains the grievance process, including Part III of the *RCMP Act*, the *Commissioner's Standing Orders (Grievances and Appeals)*, and Mr. Atwood's affidavit.

[23] Second, Mr. Atwood asserts that the affidavit itself is an example of the unfairness he complains of in the underlying judicial review because the affidavit provided grievance decisions to the Court which were not accessible to the applicant (grievor) in that proceeding. That the Court had access to these grievance decisions is very clear in the Court decision itself (*Stentaford* at para 20). A key issue in *Stentaford* was whether the decision maker had unreasonably deviated from a line of other grievance decisions that the RCMP provided to the Court.

[24] Whether characterized as a relevance finding at the preliminary stage or a determinative factor in the Court's assessment under Rule 312, the result would be the same: the affidavit would not be admitted because the Court found it of no assistance in deciding the underlying judicial review. I see no palpable and overriding error in this assessment; nor do I find any legal error sufficient to grant the appeal given the overall flexible and discretionary nature of the decision to admit additional evidence under Rule 312.

V. Admissibility of the Affidavit

[25] Mr. Atwood also raised two arguments challenging the Case Management Judge's comments on the admissibility of the affidavit. I use the word "comments" instead of "findings" because the Order explicitly states that the decision to not admit the affidavit is based on relevance. The comments on the admissibility of the affidavit were not the basis on which the Case Management Judge dismissed Mr. Atwood's motion. The Order makes no final determinations on the admissibility of the affidavit. Accordingly, I decline to comment on these issues on appeal.

VI. Request to Amend Notice of Application

[26] Mr. Atwood seeks leave on appeal to amend the Notice of Application. This issue was not considered by the Case Management Judge. My role on appeal is to review the Case Management Judge's decision to not admit the affidavit. The request to amend is not related to the appeal. Mr. Atwood can direct the request to amend the Notice of Application to the Case Management Judge.

VII. Disposition

[27] I am not satisfied that there is a basis to set aside the Case Management Judge's Order. The appeal is dismissed. Mr. Atwood was ordered to pay costs of his motion before the Case Management Judge. I am not disturbing this Order. Given the nature of Mr. Atwood's submissions on appeal, I decline to exercise my discretion under Rule 400 to order any further costs.

THIS COURT'S JUDGMENT is that:

1. The Rule 51 motion to appeal the January 6, 2023 Order of the Case Management Judge is dismissed; and
2. No costs are awarded.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-321-22

STYLE OF CAUSE: DAMON ATWOOD v ATTORNEY GENERAL OF CANADA

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: JULY 13, 2023

SOLICITORS OF RECORD:

Damon Atwood

James Elford
Department of Justice Canada
Edmonton, Alberta

ON HIS OWN BEHALF

FOR THE RESPONDENT