Date: 20091119

Docket: T-974-08

Citation: 2009 FC 1191

Vancouver, British Columbia, November 19, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TIMOTHY NIXON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7, in respect of the decision of an RCMP Level I Grievance Adjudicator, Inspector Robert Bourget, dated May 6, 2008, finding and deciding that the Chief Human Resources Officer (CHRO) is the appropriate respondent to the applicant's performance assessment grievance. These are my reasons for determining that judicial intervention at this stage would be premature.

I. Background

[2] The applicant is a lawyer employed as a civilian member of the RCMP and represented himself in this application. The main issue in his grievance is the assessment of the level of his performance for the fiscal year 2006-2007. Mr. Nixon asserts that the manner in which the RCMP assessed his performance and allotted performance pay for that year utilized a procedure that was fundamentally unfair.

[3] Assistant Commissioner Mole, Acting Deputy Commissioner Human Resources, made the final decision as to the applicable level and corresponding performance bonus. In so doing, he relied upon the assessment and evaluation made by a committee of senior officers, known as the "Departmental Review Committee" (the DRC). The DRC had assessed Mr. Nixon's performance as "Superior" which was a level below the "Outstanding" assessment recommended by his immediate supervisor.

[4] At the time of the filing of the grievance on July 25, 2007, the identities of the members of the DRC were unknown to Mr. Nixon and accordingly they were not initially named by him as respondents. However, it was his intention from the outset to include the members of the DRC as respondents to his grievance and he later identified the committee members and submitted their names to the grievance coordinator to be included as respondents.

[5] Mr. Nixon then sought an order to compel the Office for the Coordination of Grievances to serve each of the persons he had named, including the members of the DRC, with a copy of the grievance as respondents.

II. Decision Under Review

[6] The Adjudicator found that the Chief Human Resources Officer (CHRO) is the appropriate respondent in this case. The role of the DRC was to evaluate assessments and either agree or recommend changes with supporting rationales to the CHRO. The responsible authority and ultimate decision maker, in the view of the Adjudicator, was the CHRO. Therefore, only the CHRO was an appropriate respondent. The Adjudicator determined that, in essence, only one person assumed responsibility for the decision and only one was required to respond.

[7] The Adjudicator then forwarded the grievance to the Professional Standards and External Review Directorate to be acted upon.

III. Issue

[8] The sole issue is whether the RCMP Level I Grievance Adjudicator, made a reviewable error on any of the statutory grounds listed in subsection 18.1(4) of the *Federal Courts Act* when he found that the CHRO was the appropriate respondent.

IV. Analysis

[9] Before the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, three standards of review were available for tribunal decisions; after that decision there are only two: correctness and reasonableness. The standard of patent unreasonableness was subsumed under the reasonableness standard: *Laplante v. Canada (Attorney General)*, 2008 FC 1036, [2008] F.C.J. No. 1293, at para. 23.

[10] The Adjudicator is to be shown a great deal of deference in assessing the reasonableness of his decision. He is familiar with the internal working of the RCMP and its employee relations and policies, and, like a labour arbitrator, is knowledgeable in the area and deserving of respect and deference: *Smith v. Canada (Attorney General)*, 2009 FC 162, [2009] F.C.J. No. 205, at para. 14, citing *Dunsmuir*, supra, at para. 68; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2, at para. 22.

[11] The applicant submits that he has a substantive right under s. 31 of the *RCMP Act* to grieve the individual acts of each member of the DRC that participated in the evaluation of his assessment. The applicant alleges that he was denied procedural fairness in the manner in which the Adjudicator disposed of his request that the committee members be added as respondents to the grievance and denied the right to be heard before the decision was made.

[12] The respondent's position is that the applicant will have the opportunity to submit his arguments about the involvement of the members of the DRC and the decision not to include them as respondents when the grievance proceeds to phase 2 of the grievance process. He can also complain at that time about the manner in which the Adjudicator collected information prior to making his decision. The respondent submits that the Bourget Decision is an interlocutory and procedural decision. It is not determinative of any substantive right.

[13] I agree with the respondent that this application is premature. For that reason, I make no finding as to the merits of the applicant's complaints about the process followed or the decision reached by the Adjudicator.

[14] Courts are reluctant to intervene in grievance procedures until applicants have exhausted all of the remedies available to them within that process. As explained by Justice Anne Mactavish in *Sherman v. Canada (Customs and Revenue Agency)*, 2006 FC 715, [2006] F.C.J. No. 912, at paragraph 40, there are a number of reasons for this:

> …including the fact that the application may be rendered moot by the ultimate outcome of the case, and the risk of the fragmentation of the process, with the accompanying costs and delays. Also of concern is the absence of a full record at the preliminary stage, with the resultant inability to see how the ruling actually played out in the ultimate determination of the case. There is also the possibility that the tribunal may end up modifying its original ruling as the hearing unfolds."

[15] The applicant insists that the matter will not become moot if he succeeds in his grievance as the issues he has raised about the choice of respondents and the manner in which the Adjudicator

proceeded may remain outstanding even if he succeeds in achieving the higher performance level. He contends that there is a public interest in having the Court judicially review the Adjudicator's decision as, he submits, there were egregious violations of procedural fairness.

[16] The applicant does not acknowledge that there is a "risk of fragmentation of the process" should the Court intervene at this stage of the process. He submits that it would be speculative to assume that other issues may arise during the remaining stages which might later be subject to judicial review. I disagree. In my view, the applicant is asking the Court to open the door to multiple interventions in the RCMP grievance process prior to the ultimate outcome.

[17] Unless there are special circumstances, the general principle is that interlocutory decisions are not subject to judicial review: *Cannon v. Canada (Assistant Commissioner of the RCMP)*, [1998] 2 F.C. 104, [1997] F.C.J. No. 1552, at para. 17; *Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy)* (T.D.), [1997] 2 F.C. 719, [1997] F.C.J. No. 294; *Mohawk Council of Kahnawake v. Jacobs*, [1996] A.C.F. no 757, [1996] F.C.J. No. 757.

[18] Special circumstances may be found where there is, for example, a challenge to the constitutionality of the tribunal: *Zundel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255, [2000] F.C.J. No. 678 (F.C.A.); *Szczecka v. Canada (Minister of Employment and Immigration)*, (1993), 116 D.L.R. (4th) 333, [1993] F.C.J. No. 934; *Pfeiffer v. Canada (Superintendent of Bankruptcy)* (T.D.), [1996] 3 F.C. 584, [1996] F.C.J. No. 585, at para. 17.

[19] The applicant cites *Cannon*, above, for the proposition that procedural fairness issues constitute special circumstances calling for the judicial review of an interlocutory decision. *Cannon* was a case in which the applicant's attempt to subpoena the prosecuting officer as a witness had been denied by the adjudicator. The Court dismissed the application on the basis that this was an interlocutory decision in the context of a proceeding that could be the subject of an appeal to the Commissioner, and if necessary, subject to judicial review if a procedural error of significance was not remedied by the Commissioner's ruling. I do not read Justice MacKay's comments in *Cannon* about procedural fairness issues as an invitation to bring them before the Court at an early stage of the grievance process.

[20] Here the evidence indicates that the applicant will have the opportunity to submit his arguments about the role of the DRC members and the Adjudicator's decision when the grievance proceeds to phase 2 of the process. Any procedural error of significance may be remedied at that stage. And if not, assuming that the matter is not by then moot, it remains open to the applicant to then seek a remedy through judicial review. There are, therefore, no special circumstances that would warrant the Court's intervention to review the Adjudicator's interlocutory decision at the present time. This application is premature.

[21] The respondent seeks costs. While they would normally follow the result, I will exercise my discretion in this matter not to award them as the applicant appears to have been motivated in bringing this application to correct what he considers to be flaws in the grievance process.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed. The parties will bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-974-08**
STYLE OF CAUSE:	**TIMOTHY NIXON** **v.** **THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	**VANCOUVER, BRITISH COLUMBIA**
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