

Federal Court



Cour fédérale

Date: 20230612

Docket: T-1251-19

Citation: 2023 FC 831

Ottawa, Ontario, June 12, 2023

PRESENT: The Honourable Mr. Justice Favel

SIMPLIFIED ACTION

BETWEEN:

**NAZARELYS PAULA MEJIAS TURMERO,
SANTIAGO EMILIO GARCIA MEJIAS,
VICTORIA PAULINA GARCIA MEJIAS, AND
PAUL EMILIO GARCIA MEJIAS**

Plaintiffs

and

**AIR CANADA AND
ATTORNEY GENERAL OF CANADA**

Defendants

ORDER AND REASONS

I. Nature of the Matter

[1] Nazarelys Paula Mejias Turmero [Plaintiff], on behalf of herself and her three minor children [Minor Plaintiffs], commenced a simplified action for damages based on complications the Plaintiffs encountered on a trip to Panama. Specifically, the Plaintiffs were delayed returning

to Canada by one month and two days, resulting in the family incurring out of pocket expenses in the amount of USD \$4,520.13. This proceeding has been extensively case managed as evidenced by the recorded Court entries attached to the Plaintiff's affidavit. Notwithstanding the issue of representation of the Minor Plaintiffs, I will refer to the moving party as the Plaintiffs collectively, for ease of convenience.

[2] On May 24, 2023, the Plaintiffs filed a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*FCR*] seeking:

1. an Order, pursuant to Rule 51, setting aside the May 17, 2023 Order [May 17 Order] of the Case Management Judge, Associate Judge Horne [CMJ], and directing that the moving parties' motion record(s) for motions returnable at the pre-trial conference be served and filed within ten (10) days of disposition of this motion;
2. an Order, pursuant to Rule 55, directing that notwithstanding Rule 298, the present motion be determined before any other steps are taken in the proceeding; and
3. such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.

[3] Briefly, the Plaintiffs interpret the May 17 Order as cutting short their time for serving and filing motions returnable at the June 12, 2023 Pre-Trial Conference [PTC]. The Respondents disagree with this interpretation.

[4] For the reasons that follow, the appeal is dismissed.

II. Background

[5] The May 17 Order relates to one communication and one Direction that the Court issued after the PTC requisition was filed, relating to filing deadlines for motions. Leading up to the May 17 Order are a series of communications set out in the Plaintiff's motion record, summarized below.

[6] The Federal Court Registry [Registry] issued a communication to the parties on March 14, 2023 [March 14 Communication], setting the date for the PTC and advising that if any parties were bringing motions at the PTC, all motion materials were to be filed and served by June 1, 2023.

[7] On May 2, 2023, the Plaintiff wrote to the Court objecting to some materials in the Defendant Attorney General of Canada's [AGC] PTC memoranda. The Plaintiff sought the CMJ's guidance about the preferred procedure to address these irregularities, noting that a motion under Rule 58 of the *FCR* may not be practical as it would be too late to address the contents of the AGC's PTC memoranda. The Plaintiff also proposed an alternative where the Court may permit the Plaintiff to file a reply PTC memorandum to address the irregularities.

[8] On May 8, 2023, in response to the Plaintiff's May 2, 2023 correspondence, the CMJ issued a Direction [May 8 Direction] setting May 23, 2023 as the date for the service and filing of moving motion materials returnable at the PTC, including any motion related to the

representation of the Minor Plaintiffs. The date set for the service and filing of responding motion records was June 7, 2023.

[9] On May 10, 2023, the Plaintiff wrote to the Court stating that the May 8 Direction set a deadline for the service and filing of motion materials, which was nine days earlier than that set out in the March 14 Communication. The Plaintiffs stated that they had “planned their affairs” relying on the March 14 Communication and that they would be unable to serve and file motion materials before June 1, 2023. They asked the CMJ to correct and/or amend the May 8 Direction to reflect the June 1, 2023 deadline.

[10] On May 12, 2023, the AGC replied, disagreeing with the Plaintiff’s interpretation of the March 14 Communication. They stated that, if the Plaintiffs filed their motion materials on June 1, 2023, the Defendants would be unable to file their responding motions records on that same day. They submit that the timelines set out in the May 8 Direction be maintained as they afford the parties an additional seven days to respond to any motions brought by a moving party.

[11] On May 12, 2023, the Defendant Air Canada [Air Canada] replied, agreeing with the AGC. They add that it is apparent that the Plaintiffs are not actually preparing the materials but that Gabor Lukacs is preparing them, like all of its other pleadings, submissions and letters to the Court.

[12] The Plaintiffs have had months to file any motions and, as of May 12, 2023, the Plaintiffs and/or Mr. Lukacs still have 11 days to prepare any motions materials in accordance with the timelines set out in the May 8 Direction.

[13] On May 12, 2023 the Plaintiffs restated their interpretation of the May 14 Correspondence and the May 8 Direction. They also noted that the AGC had not objected to the March 14 Communication and the responding records would therefore be governed by Rule 365(1)(a) of the *FCR*. The Plaintiffs state that they will suffer substantial prejudice because of the change in the deadline, which the Plaintiffs relied on to “arrange their affairs accordingly”. On May 15, 2023, the Plaintiffs essentially restated their position.

[14] On May 16, 2023, Air Canada replied, stating that they stand by their previous communication. They further state that the CMJ has complete discretion in setting any procedural deadlines, that the Plaintiff’s submissions are meritless, and that the Plaintiff’s litigation strategy is wasteful of the Court’s and the parties’ resources. The amount of time the Plaintiff has spent on this issue contradicts their assertion that they could not prepare their materials within the timeline set by the CMJ.

[15] On May 16, 2023, the Plaintiffs replied, objecting to the manner in which Air Canada characterized their litigation strategy. The Plaintiffs raised an issue with the propriety of a Registry officer issuing a communication on behalf of the Court. If there was an error on the part of the CMJ or the Registry officer in setting filing deadlines, parties should be able to rely on deadlines communicated by Registry officer and not be penalized for any mistakes made by

either the Court or the Registry officer. They state that, regardless of how the March 14 Communication came to be, the Plaintiffs have been relying on the timeline set forth therein in good faith. They added that they cannot provide their motion materials earlier than June 1, 2023.

[16] The May 17 Order, which is the subject of this appeal, is the CMJ's attempt to reply to the Plaintiff and clarify the Court's earlier communication and Direction. The specific arguments respecting the March 14 Communication and the May 8 Direction, along with the May 17 Order, will be summarized later on in this Order and Reasons.

[17] I do note that the CMJ confirmed, in paragraph 4 of the May 17 Order, that the March 14 Communication originated from him. Accordingly, in my view, no more needs to be said on this point.

III. The May 17 Order

[18] The May 17 Order provides as follows:

1. The deadlines for exchange of motion materials in the Courts May 8 Direction are unchanged.
2. Any motions that will be returnable at the [PTC] (including any motion relating to the representation of the minor plaintiffs – Rule 121 of the *FCR*) shall be served and filed by May 23, 2023. All responding motion records shall be served and filed by June 7, 2023. The plaintiffs shall be prepared to make submissions at the

pre-trial conference as to why the action brought by the minor plaintiffs should not be struck for non-compliance with Rule 121.

[19] The May 17 Order also noted that the parties have already received an extension of time for the service and filing of motions to be heard at the PTC and that, in the Plaintiffs' case, their motions that are expected to be brought have been contemplated for weeks, if not months. Accordingly, the responding parties require time to consider and respond to any motions in advance of the PTC and the Court also require time to consider the motion materials in advance of the PTC.

IV. Issues and Standard of Review

[20] The sole issue is whether the CMJ erred in issuing the May 17 Order.

[21] The Plaintiffs seek to raise an additional issue of whether this motion should be determined prior to the parties taking any additional steps in the proceeding. As I have rendered this Order in advance of the PTC, it renders this second issue moot.

[22] The Plaintiff correctly notes that an order of an Associate Judge may be appealed by a motion brought pursuant to Rule 51 to a Justice of the Federal Court. A discretionary decision, such as the one at issue, is reviewable on the appellate standard of review (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79 [*Hospira*]). Questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question

of law, are subject to the standard of correctness (*Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48).

[23] The AGC agrees with the jurisprudence cited by the Plaintiffs and adds that it is well established that the standard of intervention on appeals of discretionary decisions of an Associate Judge is as stated in *Housen v Nikolaisen*, 2002 SCC 33 at paras 19-37. The Federal Court of Appeal has recently stated that the “palpable” means an error that is obvious and “overriding” means an error that goes to the very outcome of the case (*Canada v South Yukon Forest Corp*, 2012 FCA 165 at para 46 [*South Yukon*]). The Federal Court of Canada also has found that a palpable error includes obvious illogic in the reasons, findings made without any admissible evidence, finding based on improper inferences or logical error and the failure to make findings due to a complete or near complete disregard of evidence (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 62).

[24] Air Canada repeats and relies on the submissions of the AGC.

[25] I agree with the parties’ submissions. I will review the CMJ’s May 17 Order on the appellate standard of review and determine whether he committed a palpable and overriding error.

V. Parties' Positions

A. *The Plaintiffs*

[26] The May 17 Order is based on two palpable and overriding errors: (1) that the parties have already received an extension of time for the service and filing of motions that will be heard at the PTC; and (2) that the March 14 Direction could not reasonably be interpreted as directing that the moving motion records were due on June 1, 2023.

[27] The May 17 Order cuts short the Plaintiffs' time for preparing their moving motion record by nine (9) days and moves up their deadline from June 1, 2023 to May 23, 2023. The Plaintiffs are unable to meet this tighter deadline.

[28] The March 14 Communication means that the moving parties' motion records would be due on June 1, 2023 and that the deadline for responding parties motion records would be governed by Rule 365(1)(a) of the *FCR*. The Plaintiffs arranged their affairs with the June 1, 2023 deadline in mind.

[29] The Plaintiffs submit that abridgment of deadlines, including the CMJ's exercise of discretion to move up deadlines previously communicated, requires a consideration of the "test for exceptionality" (*St-Cyr v Canada (Attorney General)*, 2021 FC 107 at paras 16-18 [*St-Cyr*]). This test has not been met as there is no urgency, there will be serious prejudice to the Plaintiffs, and the proceeding will not become moot if not expedited. Accordingly, they submit that the CMJ should have restored the June 1, 2023 deadline or alternatively, adjourned and/or rescheduled the PTC.

[30] On June 6, 2023, the Plaintiff filed a letter and reply submissions in relation to the Rule 51 motion. The letter and the reply submissions refer to another motion record, as yet unfiled and separate from the Rule 51 motion, addressing the representation of the Minor Plaintiffs, seeking to strike out portions of the AGC's Amended Statement of Defence, treating certain information as confidential, and seeking to address issues related to the AGC's PTC memoranda. The Plaintiff had requested that the Justice addressing the Rule 51 motion should also address this other unfiled motion. In her reply to the Rule 51 motion, the Plaintiff submits that the reason she was unable to serve and file her motion record returnable at the PTC before June 1 was because she was waiting for an exhibit from a lawyer that only became available on May 30, 2023. According to the Plaintiff's reply on the Rule 51 motion, this exhibit attached to the Plaintiff's affidavit in the unfiled motion is a letter from a lawyer explaining his inability to review the matter for the Plaintiff and that he thought the Plaintiff had until June 1, 2023 to address the issue of representation.

B. *The Defendants*

[31] The AGC submits that the Plaintiffs have neither argued nor identified a palpable and overriding error committed by the CMJ regarding the May 17 Order. The CMJ properly found that the March 14 Communication did not state that the parties' motion materials were to be served and filed by June 1, 2023. Rather, the March 14 Communication referred to motions that may be brought at the PTC and the CMJ, in the May 17 Order, properly noting that it would not be possible for responding parties to file their responding records also on June 1, 2023.

[32] The Plaintiffs' submission that the May 17 Order cuts short their time to prepare their motions is without merit. The Plaintiffs have raised various issues throughout the process and were informed, on various occasions, that they would need to bring formal motions, returnable at the PTC. The Plaintiffs' motions, to be addressed at a PTC, were contemplated as early as August 2022 as indicated in a September 2, 2022 Order and in February 13, 2023 and March 3, 2023 Directions. The Defendants have reminded the Plaintiffs that they needed to build in time for motion materials in providing the parties availability for the PTC.

[33] The applicable Rule governing deadlines is not Rule 365(1)(a) but Rule 385(1)(b), which empowers a case management judge to deal with any matters that arise prior to a trial or hearing and may, notwithstanding any time periods set out in the Rules, fix the period for completion of subsequent steps in a proceeding. The May 8 Direction confirmed that, the Plaintiffs were to file and serve any motion materials by May 23, 2023. The Plaintiffs have not explained why they were unable to file and serve their motions, returnable at the PTC, by May 23, 2023. Rather, they used their time to bring the current motion, which delays this proceeding.

[34] In summary, there is no merit to the Plaintiffs' motion and it should not be used to delay the PTC.

[35] Air Canada repeats the submissions of the AGC and adds that the Plaintiffs' appeal provides a snapshot of the steps taken in this simplified action, which are excessively disproportionate to the amount of damages claimed. They point to the ten pages of recorded entries attached to the Plaintiff's affidavit as an illustration of the excessive steps taken. The

Plaintiff's motion has effectively set aside the May 17 Order, which required her and the other plaintiffs to serve and file any motion materials for motions to be heard at the PTC by May 23, 2023. The Plaintiffs have not done so. This non-compliance is intentional and should not be countenanced by the Court. It is evidence of an abuse of process.

VI. Analysis

A. *Should the May 17 Order should be set aside?*

[36] At the outset, I will clarify that I am only addressing the Plaintiff's Rule 51 motion. I am not considering the unfiled motion, described at paragraph 29 herein. The unfiled materials are for the CMJ to consider with the parties at the PTC. Paragraphs 5-8 of the Plaintiff's reply submissions in the Rule 51 motion are the first time that any explanation has been put forth for any delays. As set out in the overview of the correspondence from the parties after the March 8 Direction was issued, all that the Plaintiff has explained is that they had planned or arranged their affairs such that she could not reply before June 1, 2023.

[37] After considering the Plaintiff's motion materials and the Defendants' responding materials, I find that the CMJ did not make a palpable and overriding error in issuing the discretionary May 17 Order. The May 17 Order was responsive to the Plaintiffs' concerns and sought to ensure an orderly timeframe for the service and filing of any motions and responding materials returnable at the PTC.

[38] It is well-established that as a case management judge, an Associate Judge deserves some "elbow room" or deference in which to make a decision based on the facts before them, as the

case management judge is intimately familiar with the history, details and complexities of the matter (*Hospira* at para 102-103; *C Steven Sikes, Aquero LLC v Encana Corporation Cenovus Fccl Ltd*, 2016 FC 671 at para 13). Based on the extensive Court entries attached to the Plaintiff's affidavit, it is fair to say that the CMJ in this matter is intimately familiar with history, details and complexities of this simplified action.

[39] In my view, this appeal does not raise an issue of law. Rather, it involves examining a discretionary decision of the CMJ modifying motion filing deadlines based on any issues the parties may wish to have determined at the PTC. While the May 17 Order does not provide an extensive explanation of the relationship between the March 14 Communication and the May 8 Direction, I am unable to find a palpable error that is obvious on the face of the May 17 Order. I am also unable to find an overriding error that goes to the very outcome of the case (*South Yukon* at para 46).

[40] I am not persuaded by the Plaintiff's submission that the exercise of the CMJ's discretion in issuing the May 17 Order is governed by Rule 365(1)(a) or the considerations set out in *St-Cyr*. First, *St-Cyr* involved a consideration of Rule 8 of the *FCR* and the factors to be considered in extending or abridging a period provided by the *FCR* or fixed by an order. The applicant in that case brought a motion for an expedited hearing, which was dismissed by this Court. Neither the March 14 Communication nor the May 8 Direction were an Order from the Court. The Plaintiff's reply submission also refer to case law concerning Rule 3 of the *FCR* and its flexibility in addressing mistakes. The next point addressed this submission.

[41] Second, the AGC correctly notes that Rule 385(1)(b) of the *FCR* applies. This rule confirms that a case management judge, in dealing with all matters that arise prior to the trial or hearing, notwithstanding any period provided for in the *FCR*, may fix the period for the completion of subsequent steps in the proceeding. That is exactly what the CMJ did in issuing the May 17 Order.

[42] The May 17 Order confirmed that the timelines set out in the May 8 Direction were to be maintained. It is worth repeating that the May 8 Direction was in response to the Plaintiff's inquiry to the CMJ about the best procedural approach to issues the Plaintiff observed. The CMJ considered the Plaintiff's inquiry and, in issuing the May 17 Order, explained that it would not be possible for the respondents on any motions to serve and file materials on the same day that moving records were to be filed. While the CMJ does not state that there is ambiguity or confusion created by the March 14 Communication, the CMJ ultimately rectified any ambiguity or confusion by issuing the May 17 Order and thereby maintaining the timelines in the May 8 Direction. The May 17 Order unequivocally clarifies the timelines for bringing any motions and for reply submissions to be served and filed, all with the goal of complying with Rule 298 of the *FCR*.

[43] I also agree with the Respondents that, as early as September 2, 2022, issues including the representation of the Minor Plaintiffs were to be addressed at the PTC. In response to the Plaintiff's request to have the September 2, 2022 Order varied, the CMJ also issued a February 13, 2022 Direction reminding the parties that the Court would not adjudicate a contested motion by way of correspondence from the parties and that a formal motion was required. That Direction

also reminded the parties that Rule 298 required that motions shall be returnable at the PTC in a simplified proceeding.

[44] Similarly, the March 2, 2023 Direction of the CMJ (incorrectly dated as May 21, 2023), in response to the Plaintiff's correspondence, granted the Plaintiff leave to file a modified Requisition for a PTC and once again reminded the parties that any motions were returnable at the PTC.

[45] The Plaintiff's submissions on this motion also acknowledge that certain matters, such as the representation of the Minor Plaintiffs, the confidentiality of certain documents, issues related to the examinations for discovery, and issues with the AGC's Amended Statement of Defence, were identified for some time and were all to be addressed at the PTC.

[46] The examples pointed out by both the AGC and the Plaintiff illustrate the consistent approach by the CMJ to ensure that all motions, identified for quite some time, were to be returnable at the PTC.

[47] In summary, the March 14 Communication may have resulted in an impractical approach to filing reply motion records. However, that issue was rectified by the May 8 Direction and further clarified by the May 17 Order. In my view, this was the proper exercise of the CMJ's discretion, ensuring that all parties would be able to address matters at the PTC.

[48] The Plaintiff's request to have the Member of the Court addressing the Rule 51 motion to address the unfiled motion is another example of why this proceeding has required extensive case management. The CMJ's May 17 Order reflects the Court's response to the correspondence and submissions from the parties in an effort to move this proceeding to the PTC stage.

[49] For all of the above reasons, the motion is dismissed.

VII. Conclusion

[50] The Plaintiffs' motion pursuant to Rule 51, appealing the CMJ's May 17 Order, is dismissed.

[51] Only the AGC requested costs. While the AGC seeks \$1500 in costs, I am exercising my discretion and awarding costs in the sum of \$750.

ORDER in T-1251-19

THIS COURT ORDERS that:

1. The appeal of the CMJ's May 17 Order is dismissed.
2. The AGC is granted costs in the sum of \$750 payable forthwith.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1251-19

STYLE OF CAUSE: NAZARELYS PAULA MEJIAS TURMERO,
SANTIAGO EMILIO GARCIA MEJIAS, VICTORIA
PAULINA GARCIA MEJIAS, AND PAUL EMILIO
GARCIA MEJIAS v AIR CANADA AND
ATTORNEY GENERAL OF CANADA

DATE OF HEARING: MOTION IN WRITING

ORDER AND REASONS: FAVEL J.

DATED: JUNE 12, 2023

WRITTEN REPRESENTATIONS BY:

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