Federal Court of Appeal | Cour d'appel fédérale

Date: 20231215

Docket: A-55-22

Citation: 2023 FCA 244

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

BETWEEN:

KEVIN HAYNES

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on December 7, 2023.

Judgment delivered at Ottawa, Ontario, on December 15, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: STRATAS J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] Before the Court is an appeal of an Order of the Federal Court, *per* Fothergill J. dated March 3, 2022 (the Order), dismissing a motion seeking reconsideration of a judgment the Federal Court had pronounced on February 15, 2022 (the Judgment).

[2] What led to the issuance of the Order—and this is important here—can be summarized as follows:

a) On or about January 4, 2022, the appellant filed in the Federal Court a notice of application for judicial review challenging the validity of a Level III grievance decision issued by his employer on December 1st, 2021;

b) In this notice of application, the appellant was seeking an order, in the form of a writ of *certiorari*, "that the decision under review is of no force and effect and should therefore, be re-examined";

c) By letter dated February 11, 2022, the respondent conceded that the impugned decision would not withstand scrutiny under the reasonableness standard of review and requested that it be quashed and that the matter be remitted for reconsideration after the appellant had been provided with the opportunity to present further evidence and submissions; the respondent attached a draft order to its letter;

d) There are no indications on record that the appellant's consent to the respondent's draft order was sought or obtained;

e) On February 15, 2022, the Federal Court granted the respondent's request as sought;

f) The next day, the appellant filed with the Federal Court, by way of a letter, a "response" to the Judgment, claiming that he was not provided with an

opportunity to provide a draft order of his own in which he would have sought additional relief, including costs; a draft order was provided with the letter;

g) On February 17, 2022, the Federal Court accepted the appellant's letter "as a motion record returnable in writing (rule 369 of the *Federal Courts Rules*)";

h) On February 23, 2022, the respondent filed a motion record opposing the appellant's motion letter seeking reconsideration of the Judgment;

i) On March 3, 2022, the Federal Court released the Order.

[3] In the Order, the Federal Court held that the appellant's request for reconsideration was outside the purview of rule 397 of the *Federal Courts Rules*, SOR/98-106 (the Rules). It explained that rule 397 permits reconsideration only where "(a) an order does not accord with any reasons given for it; (b) a matter that should have been dealt with was overlooked or accidentally omitted; or (c) clerical mistakes, errors or omissions are in need of correction". Being satisfied that the appellant had been granted the sole remedy he was seeking in his notice of application for judicial review, which remedy did not include costs, the Federal Court concluded that it was not open to it, on that basis, to reconsider the Judgment.

[4] Motions for reconsideration under rule 397 call for the exercise of judicial discretion. Therefore, absent an error on a question of law or an extricable legal principle, they are reviewable on the highly deferential standard of palpable and overriding error (*Sharma v. Canada (Revenue Agency)*, 2020 FCA 203, 325 A.C.W.S. (3d) 145 at para. 2).

[5] The appellant's position on appeal is two-fold. First, he claims that the Federal Court erred in law by assuming, based on an outdated practice, that he is not entitled to any kind of costs because he is not represented by counsel. However, this is not what the Order says. At this stage, the analysis must start with rule 397 and how the Federal Court applied it to the circumstances of the case. As stated above, the main ground for dismissing the appellant's motion for reconsideration is that he was granted the sole remedy he was seeking in his notice of application, which remedy did not include costs. As is well settled, there cannot be an award of costs for a particular proceeding if costs were not requested in that proceeding (*Exeter v. Canada (Attorney General),* 2013 FCA 134, 445 N.R. 356 at para. 16).

[6] The appellant conceded at the hearing of this appeal that the failure to seek costs in his notice of application was an oversight. This is something that cannot be remedied through a rule 397 motion, which mainly "addresses injustice if the Court, not a party, has overlooked or accidentally omitted something" (*Abbud v. Canada (Citizenship and Immigration),* 2007 FC 223, 155 A.C.W.S. (3d) 939 at para. 10). When this Court or the Federal Court renders a decision, it is *functus officio*, meaning that they do not have jurisdiction to revisit their decisions outside the very narrow circumstances of rule 397 (*Janssen Inc. v. Abbvie Corporation*, 2016 FCA 176, 242 A.C.W.S. (3d) 11 at para. 35; *Taker v. Canada (Attorney General)*, 2012 FCA 83, 213 A.C.W.S. (3d) 529 at para. 5). On this point alone, I cannot find any error, whether on the law or the facts, on the part of the Federal Court.

[7] In his second argument, the appellant says that he was not given the opportunity to challenge the draft order submitted by the respondent in its February 11, 2022, concession letter before the Judgment was released. He says that if he had had that opportunity, he would have asked for additional relief, including costs, as evidenced by his response on the next day to the Judgment and the draft order attached to it.

[8] At the hearing of this appeal, the Court raised some concerns about the process that led to the issuance of the Judgment. Questioned by the Court, counsel for the respondent admitted that the concession letter of February 11, 2022, was in fact a motion, although an informal one. Importantly, the letter did not state that the matter was on consent or unopposed. Thus, the Federal Court had to regard the motion as being potentially contested. Faced with this situation, the Federal Court could have asked the Registry to contact the appellant to ascertain whether he was going to oppose the motion or it could wait for the appellant's response within the next ten days (Rule 369(2)). The Federal Court did neither. Instead, it issued judgment on the second business day after the concession letter was filed.

[9] The respondent says that providing an opportunity to respond to the appellant would have served no useful purpose because he ultimately got what he had asked for in his notice of application. I disagree. Whether he was entitled to more than asked in the notice of application is in question but he had to have been given a chance to argue for it. He could have also sought an amendment to his notice of application and sought costs.

[10] I pause to point out that, when unrepresented litigants appear before courts, caution is required. It is worth reminding in this regard that judges are advised to ensure that self-represented litigants are treated fairly and are in a position to fully understand and participate in a proceeding (*Canada (Public Safety and Emergency Preparedness) v. Ewen*, 2023 FCA 225 at para. 30). For unrepresented litigants with a disability, as is the case here, courts are invited to exercise an extra layer of caution and awareness (*Haynes v. Canada (Attorney General)*, 2023 FCA 158 at paras. 33-34). For one reason or another, this seems to have been overlooked here.

[11] I am satisfied, therefore, that the concession letter was not processed according to the Rules. The Federal Court's hastiness in dealing with that letter clearly affected the appellant's procedural rights. This is especially so given the fact that the Federal Court was asked to grant judgment not on consent of both parties but on the concession of one party only. The appellant's procedural rights having been overlooked by the Federal Court, rule 397(1)(b) potentially applies.

[12] However, this is of no consequence. In the Order, the Federal Court considered the merits of the appellant's request for costs. The Federal Court found that the appellant had failed to submit sufficient evidence or other information to support any award of costs. In other words, the Federal Court turned its mind to the costs issue and ruled on its merits.

[13] Rule 400(1) establishes the basic principle that costs are in the complete discretion of the Court as to issues of entitlement, amount and allocation (*Canada (Attorney General) v. Rapiscan Systems Inc,* 2015 FCA 97 at para. 10). They are, in that sense, "quintessentially discretionary" (*Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, [2009] 2 S.C.R. 678 at para. 126). Awards of costs, therefore, command deference so that an appellate court will only intervene if they are vitiated by palpable and overriding error (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215)).

[14] Here, I see no reason to interfere with the Federal Court's finding in this regard. It was open to it to expect that the appellant would have provided some evidence or information regarding the costs he had incurred so far in the application for judicial review. This approach is consistent with this Court's jurisprudence according to which unrepresented litigants, while not barred from receiving costs, have no automatic right to the full amount contemplated by the Tariff. Rather, self-represented parties are entitled, in addition to actual outlays and disbursements, to "some form of compensation […], particularly when [they are] required to be present at a hearing and [forego] income because of that" (*Air Canada c. Thibodeau*¸ 2007 FCA 115, 375 N.R. 195 at para. 24, citing *Sherman v. Minister of National Revenue*, 2003 FCA 202, [2003] 4 F.C. 865).

[15] In order for a court to be in a position to make such a determination, it is no error to expect some evidence on record supporting the claim for costs. There was none. Therefore, I see no basis to interfere with the Federal Court's order dismissing the appellant's motion for reconsideration concerning costs in the judicial review.

[16] For all these reasons, I would dismiss the appeal. The respondent is not seeking its costs. In the particular circumstances of this case, as outlined in these reasons, I believe that this was appropriate. Therefore, no costs should be awarded in this appeal.

"René LeBlanc"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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CONCURRED IN BY:	STRATAS J.A. BIRINGER J.A.
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