2019 ONSC 7064
Ontario Superior Court of Justice (Divisional Court)

Toronto District School Board v. Child and Family Services Review Board

2019 CarswellOnt 19973, 2019 ONSC 7064

TORONTO DISTRICT SCHOOL BOARD (Applicant / Respondent on Motion) and CHILD AND FAMILY SERVICES REVIEW BOARD AND D.N. (Respondents / Moving Party on Motion)

Favreau J.

Heard: December 3, 2019
Judgment: December 5, 2019
Docket: Toronto 550/18

Counsel: Alex Munoz, Krish Chakraborty, for Applicant, Respondent on Motion
Brian Blumenthal, for Respondent, Moving Party on Motion, Child and Family Services Review Board
No one for Respondent, D.N.

***Favreau J.*:**

Introduction

1 The Child and Family Services Board (the "CFSRB") seeks to quash an application for judicial review brought by the Toronto District School Board (the "TDSB") on the grounds that the issues on the application are moot and that there has been undue delay.

2 The TDSB agrees that the application is moot, but argues that the issue raised on the application is important and elusive of review, and that the Divisional Court should therefore hear the application. The TDSB acknowledges that it has delayed the application, but argues that there is no prejudice to the respondents in allowing the application to proceed.

3 For the reasons that follow, the CFSRB's motion is granted and the application for judicial review is dismissed. The delay on its own is sufficient to justify dismissing the application. Even without excessive delay, the application is moot and these are not circumstances in which the Court should exercise its discretion to decide the case.

Background

4 The underlying application relates to the respondent D.N.'s son, who was a student at a TDSB school in 2017 (D.N.'s son is referred to as the "Student" and his school is referred to as the "School" throughout this decision).

5 In June 2017, the Student was under police investigation related to allegations of sexual assault. On June 8, 2017, the principal of the School advised the Student's parents that their son would not be admitted to the School starting the next day due to the police investigation.

6 On September 21, 2017, the principal of the School advised the Student's parents that the refusal to admit the Student was no longer in effect and that the TDSB had instead issued a 20-day suspension against their son.

7 On September 22, 2017, N.D. appealed the Student's suspension to the CFSRB pursuant to section 311.7 of the *Education Act*, R.S.O 1990, c. E.2.

8 After the appeal was commenced, the TDSB raised an issue about the CFSRB's jurisdiction over the appeal. The TDSB took the position that the CFSRB did not have jurisdiction because section 311.7 only gives the tribunal jurisdiction to hear expulsion appeals and the Student had been suspended and not expelled.

9 The CFSRB heard a preliminary motion on this issue on October 3, 2017. In a decision released on October 6, 2017, the CFSRB found that it had jurisdiction over the appeal because the TDSB "effectively expelled" the Student given the totality of the circumstances. In reaching this conclusion, the CFSRB had regard to the fact that the student was not offered an alternate space in another TDSB school but instead was only offered a space in a special program operated by the TDSB for suspended and expelled students.

10 Following the issuance of the CFSRB's decision on the issue of jurisdiction, the TDSB and D.N. entered into minutes of settlement in the context of a mediation. The settlement provided that the Student was expelled from the School, and imposed conditions for his readmission to other specified schools within the TDSB.

11 In addition, the minutes of settlement stated that the TDSB was not waiving its right to challenge the CFSRB's jurisdiction decision:

> The Parties agree that the Board's participation in these proceedings do not constitute a waiver of any rights of the Board to challenge the October 6, 2017 decision of the CFSRB and is done without prejudice and without waiving its rights to challenge the CFSRB's interim decision rendered on October 6, 2017.

12 The TDSB commenced an application for judicial review of the CFSRB's jurisdiction decision on August 13, 2018, which is over 10 months after the decision was issued.

13 In its notice of application for judicial review, the Board takes the position that the CFSRB erred in taking jurisdiction over the appeal brought by N.D. because the Student was not expelled. Specifically, the Board argues that the *Education Act* sets out a specific expulsion process that requires the Board to hold a hearing before a student is expelled. In this case, this was not the process that led to the Student's suspension. Rather, the School's principal complied with a mandatory requirement under section 310(1)4 of the *Education Act* to suspend a student if he or she believes the student committed a sexual assault at school, at a school related activity or in a manner that will affect the school.

14 The CFSRB filed its record of proceeding on October 5, 2018.

15 On October 13, 2018, D.N. sent an email to the parties advising that he did not intend to participate in the application, stating "I assume it's a purely legal matter and doesn't need my involvement, but if I can be helpful, I will".

16 On November 9, 2018, counsel for the CFSRB wrote to counsel for the TDSB flagging the issue of delay, stating that a "delay of six months in the commencement of an application and twelve months in the perfection of an application has been held to be sufficient to justify the dismissal of the application".

17 Despite this communication, the TDSB did not perfect its application for judicial review until September 20, 2019, which was after the Registrar sent a notice that the application would be dismissed for delay and is more than 13 months after the application was commenced.

Analysis

18 The CFSRB seeks to quash the application for judicial review on two grounds:

a. The issues raised on the application are moot; and

b. The application should be dismissed for delay.

19 Both parties agree that this motion can be decided by a single judge of the Divisional Court. Indeed, in *De Pelham v. Ontario (Human Rights Tribunal)*, 2011 ONSC 7006 (Ont. Div. Ct.), at para. 12, this Court confirmed that a single judge of the Divisional Court can dismiss an application for judicial review "where it is plain and obvious that the application should be dismissed for delay". In *Stewart v. Ontario (Director, Office of the Independent Police Review)*, 2014 ONSC 6150 (Ont. Div. Ct.), at paras. 15-24, this Court confirmed that a single judge of the Divisional Court has the authority to dismiss an application on the basis of mootness and that the plain and obvious test does not apply to this determination.

20 As set out below, I find that it is plain and obvious that the delay in this case is sufficient to warrant dismissing the application. Even if the delay on its own was not sufficient to dismiss the application, the delay supports my conclusion that this is not an appropriate case in which the Court should exercise its discretion to decide the matter despite its mootness.

Whether the application should be dismissed for delay

21 The Court has consistently held that judicial review "is an extraordinary equitable and discretionary remedy which can be denied in the face of excessive delay": see, for example, *Canadian Chiropractic Assn. v. McLellan*, 2011 ONSC 6014 (Ont. Div. Ct.), at para. 14.

22 The three following factors are to be considered when deciding whether to dismiss an application for judicial review on the basis of delay:

a. the length of the delay;

b. the explanation for the delay; and

c. whether the respondent has experienced prejudice as a result of the delay.

See *Canadian Chiropractic Association*, at para. 15.

23 In this case all three factors militate in favour of dismissing the application for delay, and, in my view, it is plain and obvious that the application should be dismissed on that basis.

24 The length of the TDSB's delay in both commencing and perfecting the application for judicial review exceeds the timelines set by this Court. As set out in the letter from the CFSRB's counsel referred to above, he Divisional Court has consistently held that a delay of more than six months in commencing an application for judicial review and more than twelve months in perfecting it are excessive: *De Pelham*, at para. 14. In this case, there was a 10 month delay before the application was commenced and a further 13 month delay before it was perfected. Cumulatively, this is a 23 month delay, which far exceeds the timelines set by the Court. As reviewed in *De Pelham*, at para. 15, many cases have been dismissed where similar or even shorter delays were at issue:

> The Applicant delayed 26 months in filing his application, and a further three months in perfecting it. Applications for judicial review have been dismissed for delay where the delay was less than 26 months: *Zhang v. The University of Western Ontario*, 2010 ONSC 6489 (CanLII), 2010 CarswellOnt 10065, 328 D.L.R. (4th) 289 (Div. Ct.) (11 months); *Schorr v. Selkirk*, 1977 CanLII 1070 (ON SC), 1977 CarswellOnt 190, 15 O.R. (2d) 37 (Div. Ct.) (dismissed when commenced 13 months after bias issue raised and one month after decision); York University *Faculty Assn. v. York University*, [2002] O.J. No. 1665 (C.A.) (dismissed based on a 16-month delay); *Balanyk*, *supra*, (dismissed based on a 21-month delay); *David Green v. Ontario Human Rights Commission*, 2010 ONSC 2648 (CanLII), 2010 CarwellOnt 3309, 263 O.A.C. 270 (Div. Ct.) (dismissed based on a 22-month delay prior to perfection.)

25 The TDSB candidly concedes that it has no explanation for the delay.

26 The TDSB argues that the Court should ignore the length of the delay and the lack of explanation for the delay because there is no prejudice to the CFSRB in allowing the matter to proceed on the merits. In making this argument, the TDSB relies

on this Court's decisions in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* [2003 CarswellOnt 3872 (Ont. Div. Ct.)], 2003 CanLII 35057 and *Solidwear Enterprises Ltd. v. U.N.I.T.E., Local 219* [2006 CarswellOnt 456 (Ont. Div. Ct.)], 2006 CanLII 2184.

27 I do not accept this argument.

28 First, the TDSB's argument that there is no prejudice ignores the fact that prejudice can be presumed from a significant passage of time: *Nahirny v. Human Rights Tribunal of Ontario*, 2019 ONSC 5501 (Ont. Div. Ct.), at para. 9. In *Nahirny*, this Court stated that timely resolution of labour relations matters is particularly important. In my view, the same principle applies to disputes over the expulsion of a student. These matters occur in real time and have significant ongoing repercussions on the relationship between the parties.

29 Second, the cases relied on by the TDSB are distinguishable from the circumstances here. In both cases, the passage of time, although extensive, was not as lengthy as in this case. In addition, and more significantly, in both cases there was an explanation for the delay. The motion judges in those cases found that, balancing all of the factors, including the explanations for the delay and lack of prejudice to the respondents, the applications should proceed. In this case, given the lack of any explanation for the delay, the TDSB is essentially arguing that an application for judicial review should be allowed to proceed, regardless of the length of the delay, as long as there is no prejudice to the respondent. This is not the test that has been established and consistently followed by this Court.

30 Third, and more significantly, I find that there is prejudice to the CFSRB tied to the delay in this case. Given the settlement between the TDSB and the Student's family, as communicated by R.N. to the TDSB and to the CFSRB, he does not intend to respond to the application. The CFSRB is therefore left as the only responding party. The CFSRB is an administrative tribunal. Its role on an application for judicial review is governed by the principles set out in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] 3 S.C.R. 147 (S.C.C.). In that case, the Supreme Court held that there is no hard and fast rule about the scope of a tribunal's participation on an appeal or an application for judicial review of its own decision. The two competing principles that generally govern this determination are the importance of having a fully informed adjudication on the one hand and the importance of maintaining tribunal impartiality on the other hand. Based on these two competing principles, at para. 59, the Supreme Court summarized the factors a court is to consider in deciding the appropriate scope of a tribunal's participation on an application for judicial review:

> In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:
>
> > (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
> >
> > (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
> >
> > (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

31 In this case, if the application were to proceed, the CFSRB would be placed in a difficult position. On the one hand, there is no other party available to actively respond to the application. On the other hand, the CFSRB is an adjudicative rather than a

policy making tribunal. In the normal course where there is an active respondent to the application, the CFSRB would play no role in defending its own decision. This difficult situation for the CFSRB is attributable at least in part to the TDSB's delay.

32 Accordingly, I would quash the application based on the TDSB's delay. In the circumstances of this case, given the length of the delay, the lack of explanation for the delay and the prejudice to the CFSRB, I find that it is plain and obvious that the application should be dismissed for delay. However, even if I had found that the delay was not sufficient to warrant dismissing the TDSB's application, I would nevertheless find that the application should be dismissed as moot.

Whether the application should be dismissed as moot

33 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), at p. 353, the Supreme Court of Canada held that a case is moot where it no longer presents a "live controversy" or where the issues it raises are merely academic.

34 In this case, the TDSB concedes that the issues on the application are moot. Indeed, N.D. and the TDSB have consented to minutes of settlement in which the parties agreed that the Student was to be expelled from the School and that he would be admitted to another TDSB school if he met specified conditions. Therefore, whether the CFSRB has jurisdiction over the dispute between the TDSB and N.D. is no longer a live controversy because the merits of the expulsion will not proceed to a hearing before the CFSRB.

35 In *Borowski*, the Supreme Court held that, even where a case has become moot, the Court retains the discretion to decide the issues in appropriate circumstances. The Court identified three factors courts are to consider in deciding whether to adjudicate a moot case:

a. whether there is an ongoing adversarial relationship between the parties;

b. whether the issue in dispute is recurring and evasive of review; and

c. whether the case raises an issue of general importance.

See also: *Ontario Provincial Police Commisioner v. Mosher*, 2015 ONCA 722 (Ont. C.A.), paras. 32-35.

36 The TDSB argues this case meets all three criteria, and that the Court should exercise its discretion to allow the case to proceed.

37 I disagree.

38 As discussed above, there is no longer an adversarial relationship between the parties. The TDSB and N.D. have resolved their dispute, and N.D. has indicated that he does not intend to participate in the application. Given its adjudicative role in disputes between the TDSB and other parties, the CFSRB is not the appropriate party to respond to the merits of the application. Therefore, if the matter were to proceed, the Court would not have the benefit of a full adversarial context to decide the issue of whether the CFSRB has the jurisdiction to decide an appeal in circumstances where a student is suspended by a principal pursuant to section 310 of the *Education Act*.

39 While the issue raised on this application may reoccur, it is not elusive of review. The only reason the dispute is elusive of review in this case is because the TDSB chose to settle the matter with R.N. Absent a resolution, the appeal on the merits would have proceeded before the CFSRB, after which the parties could have brought an application for judicial review. Based on the CFSRB's timeliness in deciding the issue of jurisdiction, the tribunal clearly has the ability to address appeals expeditiously. Similarly, if necessary, the Divisional Court can schedule an urgent application for judicial review pursuant to section 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

40 There may be some merit to the TDSB's argument that this application for judicial review raises important issues. The question of whether students have a right of appeal to the CFSRB from a principal's entry refusal or mandatory suspension obligations in cases involving allegations of sexual assault is significant and may well arise in the future. However, the TDSB's

23 month delay in pursuing this application belies the importance of having the issue decided in this case. If the issue arises again, the TDSB can bring a timely application for judicial review and the issue can be decided in a proper adversarial context.

41 The TDSB relies on the decisions in *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board* (2003), 64 O.R. (3d) 454 (Ont. C.A.) and *Kawartha Pine Ridge District School Board v. Grant*, 2010 ONSC 1205 (Ont. Div. Ct.), in support of its position that cases involving school placement or discipline should be decided even if they are moot because they raise issues that are likely to recur. In my view, these cases are distinguishable. In both cases, there was an adversarial context and the courts have the benefit of full arguments from both sides. In addition, in *Kawartha*, the Divisional Court made a finding that the expulsion issue it was dealing with was elusive of review because it involved a grade 12 student, suggesting that students in similar circumstances would often have graduated by the time the issue was ready to be considered by the Divisional Court.

42 These are not the circumstances in this case.

43 Accordingly, I find that the issues on the application are moot, and the circumstances of the case do no warrant allowing the application to proceed.

Conclusion

44 For the reasons above, the CFSRB's motion is granted, and the TDSB's application for judicial review is dismissed.

45 At the conclusion of the hearing of the motion, the parties advised that they agreed that there would be no costs of the proceedings. Accordingly, I make no order as to costs.

Application granted.