Federal Court of Appeal | Cour d'appel fédérale

Date: 20170712

Docket: A-391-16

Citation: 2017 FCA 152

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

JARRETT FAIRHURST

Applicant

and

UNIFOR LOCAL 114
and CASCADE AEROSPACE LTD

Respondents

Heard at Vancouver, British Columbia, on June 23, 2017.

Judgment delivered at Ottawa, Ontario, on July 12, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DAWSON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The applicant brings this judicial review application to set aside a decision of the Canada Industrial Relations Board (the Board), rendered April 12, 2016 (2016 CIRB LD 3600) (the Original Decision). In that decision, the Board dismissed the applicant's complaint against his former union, the respondent Unifor Local 114 (Unifor), on the basis that it had not been filed with the Board within the 90-day time period specified by subsection 97(2) of the *Canada*

Labour Code, R.S.C., 1985, c. L-2 (the Code). For the reasons that follow, I would dismiss the application.

[2] On January 8, 2015, Cascade Aerospace Ltd. terminated the applicant's employment. Unifor unsuccessfully grieved the termination. On April 7, 2015, the applicant was advised by Unifor that it would not proceed to arbitration and that he would receive a letter from Unifor explaining the reasons for its decision. The applicant then grieved Unifor's decision through Unifor's internal grievance procedures.

[3] On November 12, 2015, the applicant filed his complaint with the Board. The substance of the complaint was that Unifor had breached its duty under section 37 of the Code to provide fair representation to the applicant.

[4] In dismissing his complaint, the Board held, consistent with its prior jurisprudence, that delays arising from pursuit of internal union appeal procedures do not provide a basis on which it should extend the 90 days within which to file a complaint. The Board recognized that it had, under subsection 16(m.1) of the Code, discretion to extend the period of time, but concluded that there was nothing in the record that supported the exercise of its discretion to extend the time limit.

[5] The applicant subsequently asked the Board to reconsider its decision dismissing his complaint under section 37 because it was filed beyond the 90-day period. The Board noted in its

reconsideration decision that the applicant argued "that reconsideration is warranted because the Board failed to respect a principle of natural justice, that it exceeded its jurisdiction in issuing its decision, that the decision was erroneous in law and did not conform with the policies of the Board regarding the interpretation of the *Code*".

[6] On January 17, 2017, the Board issued its Reconsideration Decision (2017 CIRB LD 3756). The Board first considered the applicant's request for an extension of time in order to bring his reconsideration request, as it too was out of time. The Board decided to exercise its discretion pursuant to subsection 16(m.1) of the Code to extend the time limit for filing the application for reconsideration. The request for an extension was not opposed by Unifor.

[7] The Board went on to consider whether the applicant had demonstrated that there was cause to reconsider the Original Decision, according to the factors set out in *Buckmire v. Teamsters Local Union 938*, 2013 CIRB 700. Those criteria include circumstances where there are new facts which were not discoverable with reasonable diligence at the time of the original decision and which would likely have changed the original decision, where there has been a change in the law or where the Board breached procedural fairness.

[8] The Board determined that the applicant had not met any of the criteria. In particular, the reconsideration panel of the Board rejected the applicant's argument that the Board had breached natural justice by dismissing his complaint for delay. The Board noted that "timeliness is a core element of the Board's authority to decide a section 37 complaint", that the applicant had notice of the time periods and had been given an opportunity to address the determinative question as to

when he first learned of Unifor's decision not to support his grievance against Cascade. The Board dismissed the application for reconsideration, concluding that the Board appropriately dismissed the complaint as untimely, "in accordance with its longstanding practice regarding the time limits as outlined in section 97(2) of the *Code*".

[9] On October 7, 2016, the applicant applied to this Court for judicial review of the Original Decision. He filed no application in respect of the Reconsideration Decision.

[10] On June 5, 2017, two weeks prior to the scheduled hearing of this application, this Court issued a direction to the parties requesting that they be prepared to make submissions at the hearing about the applicability of the decision of this Court in *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90, 345 N.R. 130 [*Vidéotron*]. *Vidéotron* stands for the general proposition that a Court should not review an administrative decision that has been reconsidered on its merits by another panel of the tribunal if the Court is not also seized of the reconsideration decision.

[11] The applicant then filed a motion for leave to extend the period of time within which to file an application for judicial review of the Reconsideration Decision. This motion was heard and considered by the Court at the outset of the hearing of the judicial review application. The motion was dismissed, with reasons to follow in the Court's disposition of the underlying application for judicial review. I now turn to those reasons.

[12] In dismissing the motion, this Court considered the criteria governing extensions of time set out in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 [*Larkman*]: a reasonable explanation for the delay, demonstration of a continuing intention to pursue the application, the potential merit of the application and whether there is prejudice to a party as a result of the delay.

[13] In the Court's view, the explanation tendered for the delay – an assertion that the solicitor was unaware of the decision in *Vidéotron* – was not compelling. Counsel are presumed to know the law, and there was nothing in the circumstances of this case that would warrant departure from this principle. Second, there was never any intention, let alone a continuing intention, to seek judicial review of the Reconsideration Decision. The Court saw little, if any, merit in the proposed judicial review application.

[14] Having dismissed the motion for leave to extend the time to challenge the Reconsideration Decision, the principles articulated in *Vidéotron* were engaged.

[15] *Vidéotron* acknowledges the discretion of the Court to hear an application for judicial review, notwithstanding the absence of an application for judicial review of the subsequent reconsideration decision. We were urged to exercise this discretion. In support, counsel for the applicant relied on three decisions of this Court where the Court had, in fact, exercised its discretion to hear the judicial review of the initial decision in the absence of an application for judicial review of the reconsideration decision: *Veillette v. International Association of Machinists and Aerospace Workers*, 2011 FCA 32, 417 N.R. 95; *Grain Services Union (ILWU-*

Canada) v. Friesen, 2010 FCA 339, 414 N.R. 171; *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156, 420 N.R. 358. In each of those cases, however, all counsel had agreed to proceed on that basis and the Court was satisfied that it was appropriate to do so. Here, there is no such consent.

[16] The considerations which underlie the principle in *Vidéotron* are applicable in the circumstances of this case. If the applicant were successful in this judicial review application, the Reconsideration Decision which left the Original Decision intact would remain in effect.

[17] Nor is there reason for the Court to exercise its discretionary power in the case at bar. I reach this decision largely on the basis that I am not satisfied that there is potential merit to the underlying application. Absent merit in the underlying application nothing is served by the requested exercise of discretion. I will elaborate on this point.

[18] Subsection 97(2) of the Code states that individuals who wish to make complaints to the Board pursuant to section 37 must do so within ninety days "after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint." The Board addressed this issue in its Original Decision, after hearing submissions from the parties.

[19] In its November 19, 2015 letter to counsel for the applicant, the Board directed counsel's attention to both the Board's complaint form and paragraphs 40(1)(*e*) and 40(1)(*i*) of the *Canada*

Industrial Relations Board Regulations, 2012, S.O.R./2001-520 (the Regulations). These Regulations require that supporting documents be filed in support of the complaint and that the complainant identify "the date on which the complainant knew of the action or circumstances giving rise to the complaint".

[20] The Board invited counsel for the applicant to make submissions on the question when the applicant first knew of Unifor's decision not to support the applicant's grievance. The Board considered those submissions and concluded that the applicant knew, with considerable certainty, of the union's decision not to continue to represent the applicant on a specific date, but did not file the complaint until well after the expiry of the 90-day period.

[21] My assessment of the merits of the underlying case is that it is weak indeed. In this regard, I note that discretionary decisions of the Board are to be reviewed on the reasonableness standard, as this Court has acknowledged on a number of occasions (see, for example, *FedEx Freight Canada Corp. v. Teamsters Local Union No. 31*, 2017 FCA 78 at para. 23).

[22] It follows that I am not convinced, in the circumstances of this case, that the Court should exercise its discretion to depart from the principles set out in *Vidéotron*. I would therefore dismiss the application with costs.

[23] This said, since the question of the application of *Vidéotron* was raised by the Court, I would add that based on my assessment of the merits of the underlying application it follows that

if the reconsideration decision had been challenged as it should have been, I would not have been persuaded to allow the application for judicial review. The deference owed to a decision of the Board is such that neither decision was unreasonable or unfair.

"Donald J. Rennie"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD DATED APRIL 12, 2016, FILE NO. 31372-C ([2016] CIRB LD 3600)

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CONCURRED IN BY:	DAWSON J.A. WEBB J.A.
DATED:	JULY 12, 2017

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