Date: 20081210

Docket: A-115-08

Citation: 2008 FCA 386

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

MICHEL AUBERT

Appellant

and

ATTORNEY GNERAL OF CANADA
for and on behalf of TRANSPORT CANADA

Respondent

Hearing held at Montréal, Quebec, on December 3, 2008.

Judgment delivered at Ottawa, Ontario, on December 10, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NOËL J.A.

Date: 20081210

Docket: A-115-08

Citation: 2008 FCA 386

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

MICHEL AUBERT

Appellant

and

ATTORNEY GENERAL OF CANADA
for and on behalf of TRANSPORT CANADA

Respondent

REASONS FOR JUDGMENT

DÉCARY J.A.

[1] The appellant is Superintendent of Safety Oversight Operations in the Civil Aviation group of Transport Canada. He is subject to a collective agreement that provides that he may present a grievance no later than the twenty-fifth day after the employer's action giving rise to the grievance.

[2] In August 2004, he requested authorization to work as a pilot for a foreign company outside his regular working hours. On September 20, 2004, the Regional Director General, Quebec, notified

him in writing that authorization was refused because such activity could lead to an appearance of a conflict of interest within the meaning of the *Values and Ethics Code for the Public Service*.

[3] For more than two years, the appellant took various subsequent measures to convince his employer to change its decision. Those measures were unsuccessful.

[4] On October 27, 2006, the appellant filed his grievance.

[5] The grievance was ruled invalid at all three levels on the basis that it had been filed more than 25 days after the Minister's decision. At each level, the decision-maker informed the appellant that the grievance would have been denied on its merits in any event.

[6] The appellant then brought an application for judicial review. The application was dismissed by Justice Martineau (2008 FC 216), who concluded that the grievance was invalid and that, in any event, it was without merit. The judge applied the standard of patent unreasonableness in the first part of his decision and that of reasonableness in the second.

[7] In light of my conclusion, I will address the first part only.

[8] The judge found that "[t]he predominant evidence in the record indicates that the applicant filed his grievance more than two years after having been informed of the [Minister's] position with respect to his request to hold more than one job simultaneously" (paragraph 4).

[9] Dismissing the appellant's claim that the grievance involved a recurrent or repetitive situation (the use of the expression [TRANSLATION] "ongoing grievance", often found in doctrine and case law, is incorrect), the judge also found that "[t]he main object of the applicant's grievance is the legality of a firm decision at a fixed point in time . . ." (paragraph 7).

[10] The appellant now comes to this Court. He argues that, regarding the issue of invalidity, the judge should have applied the standard of review of correctness since, according to the him, it is a question of law.

[11] It is true that issues regarding the applicable rule of prescription generally relate to questions of law, but that is not the issue in this case. Essentially, this is a matter of weighing the evidence to determine who decided what and when. The appellant submits that he filed separate applications, which led to separate decisions, the last of which was rendered fewer than 25 days before he filed the grievance.

[12] The appellant also argues that, since the privative clause is "relatively weak" in this case (see *Assh v. Canada (Attorney General*) (F.C.A.), 2006 FCA 358, paragraph 35) and since the decision-maker is not an independent adjudicator but rather the employer itself, which has a vested interest in ensuring that the grievance be time-barred, the standard of review should be that of correctness. I disagree. Certainly, those are factors that urge the Court to be particularly vigilant,

but, in these circumstances, the issue of the timeliness of a grievance remains nonetheless a question of fact. It is the standard of reasonableness that applies.

[13] Since the judge had applied the then-recognized standard of patent unreasonableness, this Court reviewed the Minister's decision in light of the standard of reasonableness.

[14] Based on the sequence of events and the appellant's choice of words in his applications and pleadings, it can be reasonably concluded that, in reality and for all intents and purposes, the appellant merely resubmitted his original application several times. Case law is clear: in such circumstances, the starting date of the limitation period is not postponed simply because a party continues to question a decision and receives answers that merely reaffirm the original decision or because he or she objects to the original decision (see *Taylor v. Public Service Commission of Canada,* 2003 FCT 566; *Camoplast Inc. – Division Mode et Syndicat des travailleurs du vêtement de Richmond*, [1998] R.J.D.T. 476).

[15] I would dismiss the appeal with costs.

"Robert Décary"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Marc Noël J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-115-08

(APPEAL OF AN ORDER OF JUSTICE MARTINEAU, FEDERAL COURT, DATED FEBRUARY 19, 2008, DOCKET NUMBER T-1279-07)

STYLE OF CAUSE:	Michel Aubert v. Attorney General of Canada for and on behalf of Transport Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 3, 2008
REASONS FOR JUDGMENT BY:	DÉCARY J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. NOËL J.A.
DATED:	December 10, 2008

APPEARANCES:

Loic Bernikoff Raymond Doray	FOR THE APPELLANT
Vincent Veilleux Neil McGraw	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lavery, de Billy Montréal, Quebec	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT