Federal Court of Appeal  Cour d'appel fédérale

Date: 20220623

Docket: A-312-20

Citation: 2022 FCA 122

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

ALI GUIDARA

Applicant

and

ATTORNEY GENERAL OF CANADA
(CANADA REVENUE AGENCY)

Respondent

Application for judicial review dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on June 23, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an application for judicial review whereby the applicant seeks to set aside a decision rendered on December 2, 2020, by the Federal Public Sector Labour Relations and Employment Board (the Board). In its decision, the Board refused to extend the time limit that would have allowed the applicant to refer to adjudication grievances that he had filed against his then employer, the Canada Revenue Agency (the CRA), challenging the decisions made by the

CRA to (i) suspend him without pay, (ii) revoke his reliability status, and (iii) terminate his employment.

[2] These decisions were made in January and February 2015 because the CRA was of the view that the applicant had placed himself in a conflict of interest and had failed to inform management, which demonstrated gross negligence.

[3] As evidenced by the order issued by the Chief Justice of this Court on May 31, 2022, this matter was considered without appearance of the parties at the request of the applicant, who is now representing himself. It was therefore disposed of on the basis of the record as constituted by the parties.

[4] The grievance and referral-to-adjudication process applicable in this case is set out in the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, and the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 (the Regulations). According to subsection 90(1) of the Regulations, a grievance must be referred to adjudication "no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process."

[5] In this case, the application for an extension of time at issue, made under paragraph 61(*b*) of the Regulations, was filed more than 18 months after the applicant and his Union, the Professional Institute of the Public Service of Canada (the Union), were informed of the decision at the final level of the applicable grievance process. This provision authorizes the Board to

extend the time limit set out in subsection 90(1) of the Regulations, among other things, “in the interest of fairness.”

[6] In rendering its decision, the Board first pointed out the criteria applicable to an application for an extension of time made under paragraph 61(*b*) of the Regulations, which were established in its own case law. These are as follows: (i) clear, cogent and compelling reasons for the delay; (ii) the length of the delay; (iii) the due diligence of the applicant; (iv) the balance between the injustice to the applicant and the prejudice to the employer in granting or denying the extension; and (v) the chances of success of the grievance. It noted that, although these criteria must be assessed as a whole, the weight to be given to each criterion may vary according to the specific circumstances of each case because it is possible that only one or two criteria ultimately weigh in the balance.

[7] The Board first found that the applicant had not demonstrated that there were clear, cogent and compelling reasons for the delay. The Board noted from the evidence before it that the Union was prepared to refer the grievances to adjudication; that the Union submitted the required referral forms to the applicant; and that after assessing his chances of success, the applicant chose not to sign those forms, opting instead to bring an action in damages against the CRA before the Superior Court of Québec. The Board concluded that the decision to bring an action before the Superior Court of Québec rather than referring the grievances to adjudication was a strategic choice made knowingly by the applicant. The Board found it incongruous that in the circumstances and because the applicant’s legal action led nowhere, he could then turn to the referral-to-adjudication process, which he had consciously chosen not to undertake to begin with.

[8] Having found that the applicant had failed to meet the criterion of a clear, cogent and compelling explanation for the delay, the Board considered the other criteria even though it was of the opinion that it was not strictly necessary in the circumstances. The Board determined that the applicant did not act with due diligence. In making this finding, it noted, first, that the applicant had not brought an action before the Superior Court of Québec until several months—in fact almost a year—after his three grievances had been dismissed and, second, that he did not file his application for an extension of time until 10 weeks after the Superior Court had rendered its judgment in November 2016, well beyond the 40-day time limit set out in subsection 90(1) of the Regulations, if it is accepted that the clock for the time limit started to run on the date of that judgment.

[9] The Board found that the prejudice criterion favoured the applicant, but had less weight than the applicant's failure to provide clear, cogent and compelling reasons for the delay. As for the criterion relating to the chances of success of the grievances at issue, the Board found only that the grievances were not frivolous given that it had not heard them on the merits. The Board then conducted a detailed review of the case law submitted by the applicant and found that it did not help his case.

[10] Finally, the Board disposed of an argument based on a comment in the Superior Court of Québec judgment dismissing the applicant's action for damages. In making this comment, the Court criticized the CRA for not having informed the applicant that he could have referred his grievances to adjudication. The Board rejected this argument, taking the view that the CRA is

under no obligation to provide advice to employees on referrals to adjudication, especially in cases where, as here, the employee was represented throughout the grievance process.

[11] A significant proportion of the applicant's written representations is dedicated to criticizing the decisions giving rise to his three grievances and the investigation that preceded them. However, he says very little about the Board's decision, which is the only decision the Court must deal with in this application for judicial review.

[12] Essentially, the applicant criticizes the Board for having dismissed his application for an extension of time [TRANSLATION] "without considering that the initial grievance (the grievance contesting his suspension without pay) failed to comply with the rules in force and on the basis of the employer's arguments alone." He maintains that his ignorance of the grievance process and its deadlines as well as the Union's failure to fulfill its duty of fair and equitable representation constitute strong, clear and compelling arguments for granting the extension sought.

[13] The applicant did not persuade me that the Court's intervention is warranted. It is important to point out, from the outset, that reasonableness is the applicable standard in a case such as this one and in the vast majority of cases where a court reviews an administrative decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 (QL/Lexis) at para. 10 (*Vavilov*); *Grekou v. Canada (Attorney General)*, 2021 FCA 220, [2021] F.C.J. No. 1894 (QL/Lexis) at para. 8; *Popov v. Canada (Attorney General)*, 2019 FCA 177, 2019 CarswellNat 2478 (WL Can) at para. 10).

[14] It is also important to point out that reasonableness is a deferential standard of review. This means that the Court must "avoid 'undue interference' with the [Board's] discharge of its functions" (*Vavilov* at para. 30, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 27 (*Dunsmuir*)). In this regard, the Court must be very careful to abstain from conducting a *de novo* analysis of the issues that were before the Board, deciding these issues in the Board's place, or determining the correct solution to these issues (*Vavilov* at para. 83).

[15] Rather, the role of the Court is to ensure that the impugned decision and its underlying rationale have the "qualities that make a decision reasonable" (*Vavilov* at para. 86, citing *Dunsmuir* at para. 47). The Court must therefore be concerned with the outcome as well as the reasoning that led to it. As the Supreme Court pointed out in *Vavilov*, a reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras. 85–90).

[16] I believe that to be the case here because, in my view, the Board substantiated its decision very well, followed its previous decisions and made findings of fact that were supported by the evidence before it. In particular, the Board clearly considered the applicant's arguments and not just those of the CRA, as the applicant claims. The fact that the applicant disagrees with the Board's decision does not warrant the Court's intervention (*Harvey v. Via Rail Canada Inc.*, 2020 FCA 95, [2020] F.C.J. No. 656 (QL/Lexis) at para. 12).

[17] Furthermore, the Board noted that the applicant had been represented throughout the grievance process and that the Union had provided him, on time, with the adjudication referral

forms he had to sign and advised him of his chances of success. I see no basis for the criticism that the Board rendered its decision [TRANSLATION] "without considering that the initial grievance did not comply with the rules in force." Insofar as this criticism is based on the Union's alleged failure to fulfill its duty of representation, it must fail because, as the respondent pointed out, this argument could have been raised before the Board, but it was not.

[18] It is well settled that a court will not consider an issue on judicial review where the issue could have been but was not raised before the administrative decision maker (see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 21–26; *Oleynik v. Canada (Attorney General)*, 2020 FCA 5, [2020] F.C.J. No. 78 (QL/Lexis) at para. 71; *Canada (Attorney General) v. Valcom Consulting Group Inc.*, 2019 FCA 1, [2019] F.C.J. No. 3 (QL/Lexis) at para. 36; *Sigma Risk Management Inc. v. Canada (Attorney General)*, 2022 FCA 88, [2022] F.C.J. No. 723 (QL/Lexis) at para. 6).

[19] Finally, there is no merit to the argument that the Board should have granted the extension of time requested by the applicant because he was unaware of the ins and outs of the grievance process. As I have already mentioned, the Board had before it evidence that tended to show that the Union supported the applicant throughout the grievance process. This contradicts the applicant's assertion, despite what he now claims about the quality of the support that he received, which, as mentioned, is an argument he cannot raise before us because he did not raise it before the Board.

[20] Furthermore, the Board found that the applicant had made a conscious strategic choice by opting to bring an action before the Superior Court of Québec rather than referring the matter to adjudication. As a sign that this was a conscious choice, the Board also noted that the applicant had not had any contact with the Union between August 2015 and November 2016, when his action before the Superior Court was dismissed. As the Board pointed out, the applicant seems to have freely chosen an avenue that ultimately led to a dead end, to the detriment of another avenue, which he then wanted to return to when the first failed. This affected the credibility of his application for an extension of time to refer his grievances to adjudication.

[21] Given the evidence before the Board, I am of the view that these findings and conclusions fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and were available to the Board when it was deciding whether the applicant had explained the delay with clear, cogent and compelling reasons and, more generally, whether an extension of time was warranted in the circumstances (*Vavilov* at para. 86, citing *Dunsmuir* at para. 47).

[22] For all these reasons, I am of the view that the Board's decision is reasonable and that there is therefore no need for the Court to intervene.

[23] I therefore dismiss this application for judicial review and, given the disposition of this application, award costs against the applicant.

"René LeBlanc"
J.A.

"I agree.
Richard Boivin J.A."

"I agree
Marianne Rivoalen J.A."

Certified true translation
Margarita Gorbounova, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-312-20
STYLE OF CAUSE:	ALI GUIDARA v. ATTORNEY GENERAL OF CANADA, (CANADA REVENUE AGENCY)

APPLICATION FOR JUDICIAL REVIEW DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	BOIVIN J.A. RIVOALEN J.A.
DATED:	JUNE 23, 2022

WRITTEN REPRESENTATIONS BY:

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