Federal Court of Appeal | Cour d'appel fédérale

Date: 20230310

Docket: 22-A-23

Citation: 2023 FCA 59

[ENGLISH TRANSLATION]

PRESENT: LOCKE J.A.

BETWEEN:

ROSIE GAGNON

Applicant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 10, 2023.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

[1] Rosie Gagnon is seeking an extension of the time limit for filing an application for judicial review of the decision rendered by Member Marie-Claire Perrault of the Federal Public Sector Labour Relations and Employment Board (the Board) on November 7, 2022 (2022 FPSLREB 91).

[2] The factors to consider in order to obtain the extension of time sought by Ms. Gagnon were reviewed in *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paragraphs 61 and 62 (*Larkman*):

> [61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay". In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served.
>
> [Citations omitted.]

[3] The respondent, the Canadian Association of Professional Employees, is challenging all the factors except for the one related to its being prejudiced by the delay. It is claiming no such prejudice.

[4] For the reasons set out below, I am of the opinion that the factors for granting an extension of time to Ms. Gagnon were not satisfied, and I will dismiss the motion with costs.

[5] The relevant facts are not in dispute. The decision of the Board that is the subject of this motion (the Decision) dismissed two complaints that were made against the respondent pursuant to section 190 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, for unfair practices, as defined in section 187:

Unfair representation by bargaining agent	**Représentation inéquitable par l'agent négociateur**
187 No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.	**187** Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.

[6] Ms. Gagnon made her complaints in the context of a grievance against her former employer, the Department of Public Works and Government Services, a grievance in which the respondent refused to represent her.

[7] As indicated above, the Decision was rendered on November 7, 2022. Consequently, the 30-day time limit for filing an application for judicial review ended on December 7, 2022. Ms. Gagnon was clearly aware of this time limit: during this period, her spouse Émile Arsalane (who had represented her before the Board but who is not a member of the bar) had several exchanges with the respondent about the possibility of filing an application for judicial review. However, on December 7, 2022, Mr. Arsalane notified counsel for the respondent that Ms. Gagnon would ultimately not be filing such an application.

[8] On or around December 17, 2022, Ms. Gagnon learned that the members of the Board (other than the Chairperson and the vice-chairpersons), including Member Perrault, had been appointed by the Minister of Public Works and Government Services (the minister in charge of Ms. Gagnon's former employer). Indeed, as required by section 6 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, the Chairperson prepares a list of candidates selected "after consultation with the employer and the bargaining agents." This list tends to include, to the extent possible, an equal number of candidates recommended by the employer and by the bargaining agents. This means that the parties opposing Ms. Gagnon in her complaints and in her grievance were also the ones who created the list of candidates who could become Board members.

[9] Ms. Gagnon brought this motion on December 28, 2022. She claims that she would have filed it on December 23, 2022 (just before Christmas) but that she was prevented from doing so by a major winter storm.

[10] She argues that the system for appointing Board members results in systemic bias, actual bias or reasonable apprehension thereof, and political interference of the type referred to in *Bader v. Canada (Minister of Citizenship and Immigration),* 2004 FC 214 at paragraph 10. She relies on *MacBain v. Lederman,* [1985] 1 F.C. 856 (*MacBain*) and on paragraph 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which is reproduced below:

Construction of law	**Interprétation de la législation**
2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the	**2** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la

Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to	*Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
…	[…]
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	**e)** privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

[11] Ms. Gagnon also cites *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, and relies on the principle that "the party [being] unrepresented at the initial hearing" constitutes a circumstance in which "failure to raise bias from the outset does not amount to implied waiver".

[12] The respondent submits that Ms. Gagnon does not meet the following factors to justify the extension of time: (i) the continuing intention to pursue her application; (ii) some potential merit to the application; and (iii) a reasonable explanation for the delay.

[13] In terms of intention, the respondent notes that on December 7, 2022, Ms. Gagnon expressly indicated, through her spouse, that she did not intend to file an application for judicial review. That intention remained unchanged until December 17, 2022.

[14] As regards a reasonable explanation for the delay, the respondent notes that Ms. Gagnon is invoking her ignorance of the system for appointing Board members based on the fact that she is unrepresented, even though this is a system that is available to all, not just to lawyers. The respondent argues that Ms. Gagnon did not note any apprehension of bias upon reading the Decision, and that simply failing to consider an argument cannot be a reasonable explanation for a delay.

[15] With respect to the potential merit of her application, the respondent notes that the *Federal Public Sector Labour Relations and Employment Board Act* explicitly provides for the system for appointing Board members. The respondent also notes that subsection 6(4) explicitly requires Board members to act impartially in the exercise of their powers and the performance of their duties and functions. The respondent distinguishes *MacBain* on the grounds that the Canadian Human Rights Commission had both acted as party to the case and selected the members of the specific tribunal that would hear the complaint. In the current situation, neither the respondent nor the former employer selected Ms. Perrault as the member who would hear Ms. Gagnon's complaints. The respondent alleges that Ms. Gagnon's application has no basis.

[16] Ms. Gagnon provided written submissions in response to the respondent's response record. There is no need to comment on all these claims, but it is useful to note the following. Ms. Gagnon alleges that the only lawyers with real experience in this field work for the employer or unions, and that there is consequently a lack of experienced lawyers able to contest the bias of the Board. Later, she asks, in the event that this motion is not granted, [TRANSLATION] "how many decades will we have to wait before a future self-represented public servant without a lawyer notices this tribunal bias."

[17] Ms. Gagnon denies that this situation can be distinguished from the facts in *MacBain* because the result is that all the parties responsible for appointing Board members are her adversaries, and Member Perrault was selected from among those members. She refers to statistics that she argues are evidence of the difficulty that a former employee would have in succeeding in a complaint against his or her union under circumstances that are similar to those in this case.

[18] Ms. Gagnon also denies that subsection 6(4) of the *Federal Public Sector Labour Relations and Employment Board Act* may support Board members' impartiality. She notes that this subsection indicates that "a member does not represent either the employer or the employees" without indicating that a member does not represent the bargaining agents. She alleges that subsection 6(4) [TRANSLATION] "clearly shows that Parliament entirely forgot about the interests of public servants who lodge complaints against their union".

[19] I am satisfied that the respondent would suffer no prejudice if the time limit were extended. I am also satisfied that Ms. Gagnon has a reasonable explanation to justify her delay. I believe that before December 17, 2022, she was unaware of the way that Board members are appointed, and I recognize that she acted with diligence as soon as she learned this. I also recognize that she was unaware of this because of the fact that she was unrepresented.

[20] However, I am not satisfied that the factors related to the continuing intention to pursue the application or related to there being some potential merit to the application are in Ms. Gagnon's favour.

[21] In terms of continuing intention, it is clear that Ms. Gagnon decided on December 7, 2022 not to pursue her application and that she changed her mind only on or around December 17, 2022. During that period, regardless of the reason, she had no intention of pursuing her application. That being said, I recognize that, as indicated in *Larkman*, "not all of these four questions need be resolved in the moving party's favour", and that it is always necessary to ensure "that the interests of justice be served".

[22] I will now consider the issue of the potential merit of the application. Although the threshold is not very high for this factor, I see no potential merit to the application submitted by Ms. Gagnon. Firstly, Parliament clearly intended for Board members to be appointed from among persons recommended by the employer and the bargaining units, as provided for in the *Federal Public Sector Labour Relations and Employment Board Act*. As Ms. Gagnon acknowledged, one of the outcomes of this system is that Board members are experienced. It is also clear that, contrary to what Ms. Gagnon claims, Parliament saw no issues around bias in this appointment system. It seems that Parliament considered that subsection 6(4) was sufficient to ensure the impartiality of Board members.

[23] I agree with the respondent that *MacBain* can be distinguished from the facts in this case. In this matter, neither the respondent, nor the former employer (the Department of Public Works and Government Services), nor the Minister himself selected Member Perrault as the member who would hear Ms. Gagnon's complaints. As indicated by the respondent, the issue that this Court saw in *MacBain* resulted from the fact that a party before the tribunal had selected the person who would be hearing the case.

[24] I do not agree with Ms. Gagnon's allegation that by adopting subsection 6(4), Parliament forgot about the interests of public servants filing a complaint against their union. This allegation is clearly contradicted by the adoption of section 187 of the *Federal Public Sector Labour Relations Act*.

[25] To determine whether there is a reasonable apprehension of bias, it is necessary to ask the following: "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly": *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 at para. 20. In light of the facts in this case, I do not see how this test could be met. The statistics cited by Ms. Gagnon do not persuade me otherwise.

[26] As for paragraph 2(e) of the *Canadian Bill of Rights*, I do not accept that the system for appointing Board members could deprive a person of the right to a fair hearing of his or her case. According to Ms. Gagnon's arguments, she would have preferred her complaints to have been heard by a member who was not recommended by either the employer or a bargaining agent. However, she also claims that there is a lack of experienced lawyers in this field with no connections to either the employer or a bargaining agent. The type of appointment system that Ms. Gagnon is seeking would result in a lack of expertise at the Board, which would be far less preferable. Furthermore, I am persuaded (as was Parliament) that members are able to act impartially regardless of which party they represented before their appointment.

[27] I will now turn to the overriding consideration in this motion: whether the interests of justice would be served if the extension of time were granted. Although two of the relevant factors are in Ms. Gagnon's favour, I find that the lack of potential merit of the proposed application is more important. This final factor leads me to conclude that granting the motion would not serve the interests of justice.

[28] I reject Ms. Gagnon's argument that it will be a long time before the issue of the Board's bias can be contested if this motion is not granted. I see no obstacle to this type of challenge being made by a person lodging a similar complaint against his or her union (whether this person is represented or unrepresented), but while complying with the time limit for filing an application for judicial review.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	22-A-23
STYLE OF CAUSE:	ROSIE GAGNON v. CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	MARCH 10, 2023

WRITTEN REPRESENTATIONS BY:

Rosie Gagnon	FOR THE APPLICANT (representing herself)
Jean-Michel Corbeil	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GOLDBLATT PARTNERS L.L.P. Ottawa, Ontario	FOR THE RESPONDENT