Federal Court  Cour fédérale

Date: 20240531

Docket: T-1012-23

Citation: 2024 FC 830

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 31, 2024

PRESENT: Mr. Justice McHaffie

BETWEEN:

HUGUES MONTMINY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] To file a grievance as a translator and civilian member of the Royal Canadian Mounted Police, Hugues Montminy must follow one of two possible regimes, depending on the subject of the grievance. Mr. Montminy wanted to contest the decision to place him on administrative leave without pay. His union representative told him he had until January 6, 2022, to file a grievance,

thinking that the applicable regime was that provided for in the collective agreement, pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. He was mistaken. Rather, the regime applicable to the grievance in question was that set out in the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act], so that the grievance had to be filed no later than December 29, 2021. Mr. Montminy's grievance, filed on or about January 4, 2022, was therefore out of time by a few days.

[2] An initial level adjudicator refused to retroactively extend the time limit. She concluded that Mr. Montminy had no reasonable explanation for the delay because [TRANSLATION] "members are expected to know the applicable policies" and that an extension of time was therefore not warranted in the circumstances.

[3] At the second and final grievance level, an adjudicator concluded that Mr. Montminy had not demonstrated that the decision at the initial level was patently unreasonable. Mr. Montminy is applying to this Court for judicial review of the second decision.

[4] For the reasons that follow, I conclude that the final level grievance decision is unreasonable. The adjudicator failed to meaningfully grapple with the key issues raised by Mr. Montminy in his final level grievance, and he barely addressed the reasonableness of the decision at the initial level with respect to the extension of time. Even recognizing the deference owed to discretionary decisions, particularly in the context of labour relations, the decision cannot stand.

[5] The application for judicial review is therefore allowed. The decision at the final grievance level is set aside and the matter is remitted to a different adjudicator for redetermination. According to the agreement between the parties, Mr. Montminy will be awarded costs in the amount of $4,500, all inclusive.

II. Issue and standard of review

[6] The sole issue is whether the final level adjudicator erred in confirming the decision at the initial level and denying Mr. Montminy's grievance because it had been presented beyond the time limits.

[7] The parties agree that the reasonableness standard of review applies to this issue. I concur. The question of whether "the circumstances justify" an extension of time is one that is discretionary, that calls for deference, and that is categorized as a procedural or substantive matter: RCMP Act, ss 31(2)(a), 47.4(1); *Sauvé v Canada (Attorney General)*, 2017 FC 453 at para 49; *Madrigga v Teamsters Canada Rail Conference*, 2016 FCA 151 at para 33; *Andrews v Canada (Attorney General)*, 2023 FCA 119 at paras 9–10.

[8] A reasonable decision is one that is based on coherent reasoning and is justified in relation to the constellation of law and facts relevant to it: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 101–05. In conducting a reasonableness review, the Court asks whether the decision bears the hallmarks of justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at paras 83–86, 91–95, 99. A decision risks being characterized

as unreasonable where the decision maker has fundamentally misapprehended or failed to account for the evidence before it, or if the decision maker failed to meaningfully grapple with key issues or central arguments raised by the parties: *Vavilov* at paras 126, 128. The burden is on the party challenging the decision to show that it is unreasonable: *Vavilov* at para 100.

III. Analysis

A. *The contractual and legislative context*

[9] Mr. Montminy works as a translator in the RCMP Translation group, Official Languages. He is a civilian member of the RCMP and a member of the Translation [TR] bargaining unit, represented by the bargaining agent Canadian Association of Professional Employees [CAPE]. There are some discrepancies between the terms and conditions of employment applicable to members of the TR bargaining unit under the collective agreement and the terms and conditions of employment applicable to civilian members of the RCMP. Consideration has been given to converting civilian RCMP translators to federal public servants, a conversion originally scheduled for May 2020, but which has been postponed. According to an appendix to the Collective Agreement, until the date of conversion, the terms and conditions of employment for civilian members of the RCMP remain applicable to employees like Mr. Montminy, and only certain clauses of the Collective Agreement are applicable to them, namely articles 8, 10.05, 10.06, 10.07 and 11.

[10] Article 30.18 of the Collective Agreement stipulates that a grievor may present a grievance not later than the 25th day after the date on which the grievor is notified or on which

the grievor first becomes aware of the action or circumstances giving rise to the grievance. Article 30.23 stipulates that Saturdays, Sundays and designated paid holidays shall be excluded from determining the time within which any action is to be taken.

[11] That said, the parties agree, for the purposes of this application, that the time limit set out in article 30.18 of the Collective Agreement does not apply, because Mr. Montminy's grievance does not arise from articles 8, 10.05, 10.06, 10.07 or 11 of the Collective Agreement. Rather, the applicable grievance process is the one that exists under Part III of the RCMP Act. Under this process, a grievance must be presented at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance: RCMP Act, s 31(2)(a). Weekends and holidays are not excluded from determining the time within which any action is to be taken.

[12] The 30-day limitation period provided in paragraph 31(2)(a) may be extended pursuant to subsection 47.4(1) of the RCMP Act, which reads as follows:

[13] Grievances under Part III of the RCMP Act are also governed by the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [Standing Orders], adopted under the RCMP Act: RCMP Act, ss 2(2), 31(1). The Standing Orders provide for two levels of decision: an "initial level" and a "final level": Standing Orders, ss 7, 16, 18. According to the Standing Orders, the adjudicator at the final level "must consider whether the decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable" [emphasis added]: Standing Orders, s 18(2).

B. *The grievance and its filing*

[14] At the time of the events in question, Mr. Montminy had been working as a translator from his home in New Brunswick since 2008. At the beginning of the COVID-19 pandemic, he continued his work under the same conditions. In October 2021, the Government of Canada implemented the *Policy on COVID-19 Vaccination for the Core Public Administration including the Royal Canadian Mounted Police* [Policy], which required all employees to be vaccinated against COVID-19 and to attest to their vaccination status.

[15] Mr. Montminy refused to attest to his vaccination status. In a decision dated November 29, 2021, an Officer in Charge of Administration and Personnel of the RCMP informed Mr. Montminy that he was not in compliance with the Policy and that he would be placed on administrative leave without pay as of the date of the decision.

[16] Mr. Montminy contacted his CAPE union representative in December 2021. With the help of his union representative, he prepared a grievance against this decision in which he claims that it was not justified to require proof of vaccination or to place him on leave without pay, as there was no requirement that he return to work in person in the foreseeable future. His grievance alleges that the decision violates Mr. Montminy's rights under several provisions of the Collective Agreement, and any other relevant statutory provisions.

[17] According to the representative, he and Mr. Montminy were at all times under the impression that the applicable time limit for filing the grievance was the 25-day time limit

provided for in the Collective Agreement, which does not include weekends or statutory holidays. Applying this time limit, a grievance against a decision dated November 29, 2021, must be filed no later than January 6, 2022. The representative therefore advised Mr. Montminy to submit his grievance before this date.

[18] On Tuesday, January 4, 2022, Mr. Montminy sent an email to the Atlantic Region Official Languages Coordinator in which he referred to a grievance sent as an attachment. The next day, the Coordinator replied that she had not seen the attachment and asked him to send it again, which he did on Friday, January 7, 2022. The evidence before the Court is perhaps somewhat equivocal, but it suggests that the grievance was indeed attached to the email of January 4, 2022, despite what the Coordinator's email indicates (see Applicant's Record at 27, 365–69). The parties' arguments do not significantly revolve around this issue.

[19] Mr. Montminy first prepared his grievance on a grievance form for members of the public service, in accordance with the Collective Agreement and the FPSLRA. On January 12, 2022, the RCMP's Office for the Coordination of Grievances and Appeals [OCGA] informed Mr. Montminy that he had used the wrong form for his grievance and asked him to resubmit it using another form, for RCMP member grievances. Mr. Montminy did so on January 14, 2022, with the help of his representative.

[20] On January 28, 2022, the OCGA wrote to Mr. Montminy. Referring to the non-commissioned officers' collective agreement, which does not apply to Mr. Montminy, the OCGA informed him that the type of grievance he had submitted was no longer governed by the

RCMP Act, that he had therefore used the wrong form again, and that he was required to complete the form under the FPSLRA. In the same email, the OCGA indicated that it would raise a preliminary issue of standing and limitation period if Mr. Montminy did not voluntarily withdraw his grievance. It was not until February 7, 2022, that the OCGA confirmed that the appropriate process was indeed that filed with the OCGA, pursuant to the RCMP Act.

[21] In the meantime, on February 3, 2022, the OCGA invited Mr. Montminy to provide written submissions concerning the limitation period applicable to the grievance. The OCGA noted that the time limit set out in the RCMP Act is 30 days. According to this time limit, a grievance against a decision dated November 29, 2021, should have been submitted no later than December 29, 2021.

[22] On February 22, 2022, the union representative made submissions on behalf of Mr. Montminy in which he detailed the factual background described above. He confirmed that his impression was that the applicable time limit ended on January 6, 2022. He maintained that he and Mr. Montminy had done everything in their power to meet the deadline for filing the grievance, and that they had cooperated with RCMP management to ensure that the grievance met the necessary measures. He also asserted that the grievance should not be dismissed because of the 30-day time limit, but he was not making a formal request for an extension of time.

C. *Decision at the initial level*

[23] On November 23, 2022, the adjudicator at the initial level rendered her decision on the preliminary issue of the limitation period. The adjudicator concluded that the 30-day time limit

provided in paragraph 31(2)(a) of the RCMP Act applies and that, therefore, the grievance was filed outside the time limit. The adjudicator noted that the correct grievance form was filed on January 14, 2022, but that the first attempt to file the grievance was made on January 7, 2022. The adjudicator concluded that even if she considered a date prior to January 14, 2022, as the date of filing of the grievance, it remained [TRANSLATION] "considerably outside the 30-day limitation period".

[24] The adjudicator correctly noted that she had the authority to extend the limitation period if "the circumstances justif[ied] an extension" in accordance with subsection 47.4(1) of the RCMP Act. Although Mr. Montminy had not applied for an extension of time, she concluded that there was sufficient information on file to examine the circumstances and determine whether the grievance merited a retroactive extension.

[25] The adjudicator referred to the Federal Court of Appeal decision in *Larkman*: *Canada (Attorney General) v Larkman*, 2012 FCA 204. The parties agreed that, as stated by the adjudicator, this decision set out the analysis for determining whether an extension of time could be granted: *Larkman* at paras 61–62. The adjudicator paraphrased the four factors set out in paragraph 61 of *Larkman*, as follows:

> (a) Did the complainant have a continuing intention to pursue the application?
>
> (b) Is there some potential merit to the grievance?
>
> (c) Has the respondent been prejudiced from the delay?
>
> (d) Does the complainant have a reasonable explanation for the delay?

[26] The adjudicator also noted that at paragraph 62 of *Larkman*, the Court of Appeal explained that the importance of each question depends upon the circumstances of each case, that not all of the questions need be resolved in the complainant's favour, that other questions may be relevant, and that the overriding consideration is that the interests of justice be served.

[27] The adjudicator stated that she [TRANSLATION] "identified a problem only with the last question". She considered that there was no reasonable explanation for the delay of [TRANSLATION] "more than a week", given that the delay stemmed from an erroneous calculation and that [TRANSLATION] "[i]t is well established that members are expected to know the applicable policies". The adjudicator concluded as follows [TRANSLATION]: "[a]fter considering the four issues, I find that there is no reasonable explanation for the delay presented by the complainant that would outweigh the other considerations and justify the extension of time".

D. *Decision at the final level*

[28] Following the dismissal at the initial level, Mr. Montminy referred his grievance to the final level. His presentation of the grievance alleged that the decision at the initial level was patently unreasonable. He provided the following explanation:

> [TRANSLATION]
>
> I contacted my labour relations officer in December 2021. He prepared the file for filing the grievance and said he would send it after the holiday break. He assured me that the deadline was 30 working days (excluding Saturdays, Sundays and holidays) and that I was not allowed to consult the Info Web (Administration Manual) during my suspension. I therefore believe that a retroactive extension is appropriate and that this procedural error should not prejudice the main issue raised in the grievance at the initial level, i.e., that the decision to place me on leave without pay, without my consent, constitutes a violation of my rights under

> the applicable collective agreement (articles 4, 5, 21, 24, 25, etc.). More details: see attachment "PRESENTATION OF THE HEARING AT THE INITIAL LEVEL", submitted when the grievance was presented at the initial level.
>
> [Emphasis added.]

[29] The final level adjudicator rendered his decision on April 11, 2023, denying the grievance. In his decision, the adjudicator summarized the history of the grievance and the decision at the initial level. He cited Mr. Montminy's explanation reproduced above. He then cited subsection 18(2) of the Standing Orders and discussed the standard of review for a "patently unreasonable" decision. The adjudicator then described the central issue of the grievance in the following terms:

> [TRANSLATION]
>
> The crux of this grievance is whether the initial level adjudicator's finding that the complainant failed to submit his grievance within the 30-day limitation period prescribed by the RCMP Act is a patently unreasonable decision.
>
> [Emphasis added.]

[30] In the following eight paragraphs, the adjudicator confirmed the initial level adjudicator's finding that the grievance had been filed out of time. He then addressed the issue of extension of time in two paragraphs, reproduced below:

> [TRANSLATION]
>
> I find none of the reasons given to me by the complainant to be valid or reasonable. The complainant blames his labour relations officer for the day-counting error and believes that a retroactive extension of time is justified (Record, p 42).
>
> The complainant only made brief submissions relating to the retroactive extension of time in his second level grievance form after the initial level adjudicator had commented on the subject in

> her decision. Despite this, the complainant did not produce a more detailed submission on this subject. Accordingly, I find that there is no reasonable explanation for the delay presented by the complainant that would outweigh the other considerations and justify a retroactive extension of time.
>
> [Emphasis added.]

[31] The adjudicator therefore concluded that Mr. Montminy had presented his grievance beyond the 30-day time limit and that there was no error of a patently unreasonable nature sufficient to overturn the decision at the initial level.

[32] The adjudicator continued his analysis with a paragraph concluding that, in any event, the subject matter of the grievance was such that Mr. Montminy was not entitled to present this grievance under Part III of the RCMP Act. Rather, he concluded that the appropriate forum was to challenge the Policy in the Federal Court, citing this Court's decisions in *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232; *Wojdan v Canada*, 2021 FC 1244; and *Khodeir v Canada (Attorney General)*, 2022 FC 44. The parties agree that this analysis is flawed and that Mr. Montminy was entitled to present his grievance under the RCMP Act.

E. *The decision at the final level is unreasonable*

[33] Mr. Montminy contends that the decision of the final level adjudicator does not meet the standard of reasonableness set out in *Vavilov*. I agree.

[34] The adjudicator reasonably accepted Mr. Montminy's explanation in his final level form, reproduced in paragraph [28] above, as constituting his submissions in the grievance. These

submissions could certainly have been presented in greater detail. That said, the Supreme Court has emphasized that "administrative justice" will not always look like "judicial justice", a principle that, it seems to me, must be applied both to the parties and to the courts: *Vavilov* at para 92. As Justice Norris of this Court noted, "a decision maker must make a good faith effort to understand the submissions or evidence presented [and might need] to make allowances for the fact that an application was not prepared with professional assistance": *Jones v Canada (Citizenship and Immigration)*, 2022 FC 655 at para 34.

[35] On reading his submissions, it is clear that the central issue raised by Mr. Montminy is whether the initial level adjudicator's decision to refuse to extend the limitation period is patently unreasonable. In this respect, he points out that there was an error as to the applicable time limit, and that he was unable to consult the Administration Manual owing to his suspension. He also addresses the issue of stakes, submitting that the procedural error should not prejudice his ability to file a grievance against the decision to place him on unpaid leave, allegedly in violation of his rights.

[36] The final level adjudicator, however, considered that the [TRANSLATION] "crucial point" was whether Mr. Montminy filed his grievance within the 30-day limitation period. Most of his analysis focused on this question. This issue was not at stake: Mr. Montminy's submissions clearly accept that there was a "procedural error" in this respect. The only issue presented was that of retroactive extension.

[37] On this issue, the adjudicator offered little analysis. He noted that Mr. Montminy [TRANSLATION] "blames" his union representative for the error. He referred to the [TRANSLATION] "brief submissions" made by Mr. Montminy in his grievance form and the absence of other claims. Then, he simply concluded that [TRANSLATION] "[a]ccordingly", Mr. Montminy failed to provide a reasonable explanation for the delay that would outweigh other considerations and justify an extension of time. This last sentence repeats the initial level adjudicator's conclusion but does not provide any analysis in this respect. In particular, the adjudicator did not consider the context in which the error was made, the length of the period of delay, or the issues put forward by Mr. Montminy. Indeed, the adjudicator presented no discussion of the *Larkman* considerations, nor did he assess the reasonableness of the initial level adjudicator's balancing of these considerations.

[38] Perhaps the repetition of the initial level adjudicator's conclusion is a sign that the final level adjudicator has indeed adopted her analysis, namely that the fact that [TRANSLATION] "members are expected to know the applicable policies" is sufficient to conclude that there is no explanation that would outweigh the other considerations. However, such an approach is not, in itself, reasonable. The initial level adjudicator accepted that Mr. Montminy had demonstrated a consistent intention to present his grievance, that the grievance had [TRANSLATION] "some merit" and that the respondent had not suffered any prejudice as a result of the delay. However, her balancing of the considerations was limited to the conclusion that the error in relation to the time limit was not a justification because members are expected to know the applicable time limits, regardless of the circumstances of the error or the extent of the delay.

[39] The Attorney General of Canada appears to support this view. In his Memorandum of Fact and Law, the Attorney General submits that it is [TRANSLATION] "trite law that an error by a representative, good faith, and ignorance of the Act are not valid grounds" justifying an extension of time. In this regard, he cites this Court's decisions in *De Dieu Ikuzwe v Canada (Citizenship and Immigration)*, 2017 FC 941 at para 36, *Kiflom v Canada (Citizenship and Immigration)*, 2020 FC 205 at para 37, and *Harless v Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 369 at paras 62, 102.

[40] It should be noted, in this respect, that none of the cases cited by the Attorney General involve a brief extension based on a misunderstanding of the applicable time limit in a situation where all other factors weigh in favour of the applicant: *De Dieu Ikuweze* at paras 14, 33–36 (ten years); *Kiflom* at paras 13, 37–46, 67–69 (one month); *Harless* at paras 41, 51–63 (almost three years); *Lesly v Canada (Citizenship and Immigration)*, 2018 FC 272 at paras 3, 18–26, 32–37 (five and a half years); *Spectrum Brands, Inc v Schneider Electric Industries SAS*, 2021 FCA 51 at paras 9–14 (three months); *MacDonald v Canada (Attorney General)*, 2017 FC 2 at paras 2, 11–12, 16, 25–26 (more than six months).

[41] I do not read these decisions as establishing that an honest mistake by a party or its representative about the applicable time limit, especially in the context of competing time limits, can never be considered a sufficient explanation to justify an extension of a few days.

[42] Nor was the Attorney General prepared to make such a finding in his oral submissions. On the contrary, he acknowledged that the analysis must take into account all of the

circumstances and the other *Larkman* factors. In my view, this admission is consistent with *Larkman*, which emphasizes the balancing of relevant factors, including the period of delay, and the interests of justice: *Larkman* at paras 61–63. It is also consistent with *Koch*, which is more recent, in which the Federal Court of Appeal states that "[w]hile an error by counsel will not necessarily constitute a reasonable explanation for the delay, there is no doubt that it can be seen as one" [emphasis added]: *Koch v Borgatti (Estate)*, 2022 FCA 201 at para 56, citing, among other cases, *1395047 Ontario Inc v 1548951 Ontario Ltd*, 2006 FC 339 (at paras 23–25) and *O'Leary v Ragone*, 2022 FC 749 (at paras 45–47).

[43] The decision of the final level adjudicator, like that of the initial one, does not adopt this approach. There is neither consideration of the circumstances of the error nor any balancing of factors, beyond the assertion that members are expected to know the applicable policies. Mr. Montminy put forward the circumstances of the error that caused the delay of a few days, as well as the balancing of factors, submitting that the procedural error should not prejudice the main issue raised in his grievance. The final level adjudicator did not address these issues. The conclusion that the adjudicator finds none of the reasons provided [TRANSLATION] "valid or reasonable" does not constitute an analysis that demonstrates the justification, transparency and intelligibility expected of a reasonable decision: *Vavilov* at paras 15, 94–99, 127–28.

[44] The Attorney General relies on the adjudicator's expertise in support of his decision. It goes without saying that the adjudicator has expertise in labour relations and in the determination of grievances. That said, the decision of an adjudicator who fails to demonstrate the qualities of

justification, transparency and intelligibility does not become reasonable by a simple invocation of the expertise of its author: *Vavilov* at paras 93–96.

[45] I am therefore of the opinion that the final level adjudicator's decision does not meet the requirements of a reasonable decision.

F. *Remedy*

[46] Mr. Montminy is asking the Court to substitute its own decision for that of the final level adjudicator to grant him an extension of time. The power to grant an extension of time is granted to the Commissioner under the RCMP Act, and the Court must respect the legislature's intention to entrust the matter to him: *Vavilov* at para 142. This is not an appropriate circumstance in which to substitute the Court's decision, directly or indirectly, for that of the adjudicator: *Vavilov* at paras 139–42. The appropriate remedy is that which is generally granted, that is, to set aside the decision of the final level adjudicator and to remit the matter to a different adjudicator for redetermination.

IV. Conclusion

[47] For these reasons, the application for judicial review is granted, and the decision of the final level adjudicator is set aside. Counsel have reached an agreement on costs, for which I thank them. In accordance with this agreement, Mr. Montminy will be awarded costs in the amount of $4,500.

JUDGMENT in T-1012-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed. The decision of the final level adjudicator (grievance and appeal) dated April 11, 2023, is set aside, and the matter is remitted to a different adjudicator for redetermination.
2. Costs fixed in the amount of $4,500, all inclusive, are awarded to the applicant.

"Nicholas McHaffie"
Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

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