Date: 20090908

Docket: T-1644-08

Citation: 2009 FC 876

Ottawa, Ontario, September 8, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

TEAMSTERS LOCAL UNION NO.31

Applicant

and

THE ATTORNEY GENERAL OF CANADA

and GRAY LINE OF VANCOUVER HOLDINGS LTD.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the September 24, 2008 response of C. Armstrong, Director of the Labour Program of Human Resources and Skills Development Canada ("HRSDC") for the North West Pacific Region (the "Director") dismissing the appeal request of the Applicant with respect to the admissibility criteria for the Applicant's appeal of a Notice of Unfounded Complaint, in accordance with section 251.11(1) of the *Canada Labour Code* (R.S., 1985, c. L-2) (the "*Code*").

I. The Facts

[2] On or about November 14, 2007, the Respondent, Gray Line of Vancouver Holdings Ltd. ("Gray Line"), announced the closure of its Vancouver operations, effective March 5, 2008. On February 4, 2008, the Applicant, Teamsters Local Union No. 31 (the "Union"), filed a complaint under Part III of the *Code* in respect of the closure. Gray Line was notified of the complaint on February 27, 2008.

[3] On April 17, 2008, Mr. Stephane Novak, Inspector with HRSDC – Labour Program, advised the Applicant of his preliminary determination that the Complaint was not well-founded. On April 21, 2008, the Applicant received a copy of the preliminary decision, and was advised that it had 15 days from service to raise any objections. On May 30, 2008, the Applicant submitted its objections to the preliminary decision.

[4] A Notice of Unfounded Complaint (the "Notice") was issued by the Inspector on June 19, 2008 and received by the Applicant on June 20, 2008. The Inspector stated in the Notice that although having considered the objections, he affirmed the preliminary decision that the complaint was unfounded. The Applicant was advised that it had 15 days from service to commence an appeal.

[5] In accordance with section 251.11(1) of the *Code*, the Applicant filed an appeal on July 11, 2008, with respect to the Inspector's preliminary determination. Section 251.11(1) states that:

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.	**251.11** (1) Toute personne concernée par un ordre de paiement ou un avis de plainte non fondée peut, par écrit, interjeter appel de la décision de l'inspecteur auprès du ministre dans les quinze jours suivant la signification de l'ordre ou de sa copie, ou de l'avis.

[6] On July 31, 2008, the Applicant was advised by the Director that the Appeal Request had not been received within the timeline established by section 251.11(1) of the *Code*, and was therefore inadmissible. The Applicant received a copy of the Director's decision on August 5, 2008.

[7] On August 12, 2008, without having a legal right to review the July 31 decision, the Applicant wrote directly to the Director to make various submissions regarding the timeliness of its appeal. The Director confirmed his decision on September 24, 2008, and the Applicant received a copy of the confirmation on or about September 26, 2008.

[8] On October 23, 2008, the Applicant commenced this application for judicial review of the letter dated September 24, 2008.

II. Point in issue

[9] The Respondent, Gray Line, objects to this judicial review and submits that the Appellant's application was not submitted in time, since it was not filed within 30 days of the Director's decision. As such, it should not be considered by this Court.

[10] For the reasons that follow, this Court finds that the application for judicial review was brought after the expiry of the limitation period set out in section 18.1(2) of the *Federal Courts Act* (the "*Act*") and does not satisfy the principles surrounding applications for an extension of time, presuming that such a request had been made. As a result, the application for judicial review shall be dismissed. Both matters raise questions of law.

III. Analysis

[11] As stated in section 18.1(2) of the *Act*, an application for judicial review to the Federal Court:

18.1 (2) (…)shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	**18.1** (2) (…) sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[12] Section 18.1(2) of the *Act* makes it clear that a party applying for judicial review must do so within 30 days of the first communication of the decision. In the case at hand, the Applicant received a copy of the Director's decision on August 5, 2008. Section 251.12(6) of the *Code* clearly states that "the referee's order is final and shall not be questioned or reviewed in any court." Accordingly, the Director's decision of August 5, 2008 is the date the limitation period began.

[13] Instead of applying for a judicial review within the time allowed, the Applicant brought submissions to the Director to reconsider his final decision. The Respondents were not made aware of the correspondence between the Appellant and the Labour Program, and Gray Line consequently closed its files since time limits for filing any further legal proceeding had passed.

[14] By reassessing his decision in his letter dated September 24, 2008, the Director acted *functus officio* as the *Code* clearly states that the decision dated July 31, 2008 that denied the Appeal Request was final. The confirmation received by the Applicant on September 26, 2008 is of no effect for the calculation of the time limitation.

[15] The decision of the Director was first communicated to the Appellant on August 5, 2008. Under such circumstances, the Appellant should have commenced its application for judicial review no later than September 4, 2008. By applying on October 23, 2008, the Appellant clearly missed the limitation period dictated in section 18.1(2) of the *Act*.

[16] In *Provost v. Canada (Minister of Labour)* (2000) F.C.J. No. 222, at paragraph 7, the Federal Court of Appeal expressed concerns about allowing parties to apply for judicial review as a last remedy. The Court found that:

> In these circumstances, the appellants' conduct does not indicate any inability or incapacity on their part to file an application for judicial review, but rather indicates the desire to pursue other avenues that they considered preferable and more promising at the time.

Létourneau J. proceeded to dismiss the application for judicial review because the Appellants had taken more than 7 months to begin the action. In the case at hand, the Applicant ought to have applied for judicial review without waiting to make new submissions regarding the timeliness of its appeal. Additionally, the Applicant does not give any indication that it was incapable to apply within the time frame.

Extension of time

[17] The conclusion above terminates the matter. However, while an extension of time was not requested, given the circumstances, it is appropriate to make a few comments.

[18] Section 18.1(2) of the *Act* allows the Federal Court to increase or decrease the length of the limitation period for an application for judicial review. Over the years, a number of principles have been developed by the Courts to determine an application for an extension of time. At paragraph 34 of *Metlakatla Indian Band v. Canada (Attorney General),* [2007] F.C.J. No. 782, Lemieux J.

summarizes the factors that need to be taken into account in the exercise of discretion, found in *James Richardson International Ltd. V. Canada* [2006] FCA 180 at paragraphs 33 to 35:

> These factors include: (1) a continuing intention to bring the application, (2) any prejudice to the parties opposite, (3) a reasonable explanation for the delay, (4) whether the application has merit i.e. discloses an arguable case (hereinafter the four-prong test) and (5) all other relevant factors particular to the case.

[19] Although the Appellant has not made a request to extend the time limit set out in section 18.1(2) of the *Act* in her proceedings, we believe that it would not be granted since it would fail on the fourth factor described above. In *Metlakatla Indian Band, supra*, Lemieux, J. clarifies the four-prong test;

> an arguable case, a reasonable explanation for the delay and prejudice to another party is a means of ensuring the fulfilment of the underlying consideration of ensuring that justice is done between the parties.

The case the Appellant is bringing forth is clearly not arguable for the reasons given in the following paragraphs. In this case, the limitation period has been missed and no reasonable explanation has been brought forth by the Appellant. Moreover, Gray Line has been prejudiced since it never received any correspondence between the Appellant and the Labour Program, and consequently closed its files. We therefore do not believe that the Appellant has demonstrated the merits of its application.

[20] Furthermore, the Applicant is refuting the August 5, 2008 decision of the Director based on the admissibility criteria set out in subsections 251.11(1) and 251.1(3) of the *Code.* However, the actual service of the Notice of unfounded complaint was received by the Applicant on June 20, 2008. The time for bringing an appeal therefore expired on July 9, 2008, according to section 251.11(1) of the *Code*. The Appeal Request was filed on July 11, 2008, after the limitation period ended, and was properly rejected. There is no arguable case to be provided on this ground.

[21] As stated in *Minister of Human Resources Development v. Hogervrost,* [2007] F.C.J. No. 37, 2007 FCA 41 at paragraph 33, "it ensues that an extension of time can still be granted even if one of the criteria is not satisfied". Having reviewed all the criteria that could justify an extension of time and assuming that the Applicant would be able to justify a reasonable explanation for the delay, the other criteria are clearly not met and there are ample reasons not to grant an extension of time.

Conclusion

[22] Based on the comments above, we dismiss the Appellant's application for judicial review, as it was not received by this Court within the limitation period set out in section 18.1(2) of the *Act.*

Costs

[23] Costs will be granted to Gray Line who brought forward the successful argument based on section 18.1(2) of the *Act.* The Attorney General of Canada did not.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

- This application for judicial review is dismissed;
- The decision of the Referee dated August 5, 2008 is upheld;
- With costs awarded to Gray Line of Vancouver Holdings Ltd.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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