A-44-96

CORAM: STRAYER J.A.
LINDEN J.A.
ROBERTSON J.A.

B E T W E E N:

ROBERT W. LANCASHIRE

Appellant
(Applicant)

– and –

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by Treasury Board
(Solicitor General-Correctional Service of Canada)

Respondent
(Respondent)

HEARD at Toronto, Ontario on Thursday, October 9, 1997

JUDGMENT delivered from the Bench on Thursday, October 9, 1997

REASONS FOR BY: STRAYER J.A.

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REASONS FOR JUDGMENT
(Delivered from the Bench at Toronto, Ontario
on Thursday, October 9, 1997)

STRAYER J.A.

This is an appeal from a decision of the Trial Division of December 14, 1995, in which the motions judge refused to the applicant an extension of time to bring an application for judicial review. The "decision" sought to be reviewed was said to be that of an adjudicator acting under the *Public Service Staff Relations Act*, the alleged decision having been made on June 29, 1993 to terminate a grievance proceeding before him on being informed that the parties had settled the grievance. The application for judicial review was not filed until September 1, 1995, some 26 months later. The normal time limit for filing such an application is 30 days.

We agree with the motions judge that for the exercise of the discretionary power to extend such a time limit the Court should be satisfied that the

applicant has an arguable case and that it would be in the interests of justice to extend the time.[1] The interests of justice in this context should include consideration of the duration of, and reason for, the delay as well as possible prejudice caused by the delay. The Court may also have to balance the possible strength of the case, should it proceed, against the degree of unjustified delay and possible prejudice.

With respect to the first criterion, that of an arguable case, we respectfully disagree with the learned motions judge that the Court could have no jurisdiction for judicial review of the adjudicator's action in terminating the grievance proceeding. In our view it is at least arguable that such termination was a "decision or order" within the meaning of section 18.1 of the *Federal Court Act*. We would observe, however, that the chance of success of such an application for judicial review would not appear to be very strong, considering that the adjudication was terminated after the applicant had already withdrawn his grievance. Further, the real decision which now affects the applicant's rights is the settlement agreement which he signed, and we recognize that the applicant would have some difficulty in attacking the validity of that contract through judicial review proceedings.

In summary we conclude, unlike the learned motions judge, that in law there might be an arguable case, howsoever weak, for the applicant's judicial review application.

Turning to the question of the interests of justice, however, we believe the long and inadequately explained delay of 26 months in seeking to bring an application for judicial review overwhelmingly weighs against the grant of an extension of time. The applicant in his affidavits gives details of two lawyers he consulted, unsuccessfully, in the 10 days immediately following the termination of the grievance. After that he provides only general statements as to several unidentified lawyers he consulted over the next two years. Essentially he asserts that it took him two years to find a lawyer in the City of Toronto willing to take his case. The Court finds this unconvincing and also notes that in all this period neither he nor any lawyer he consulted made the effort at least to file an originating notice of motion.

1See e.g. *Grewal v. M.E.I.* [1985] 2 F.C. 263 (C.A.).

The learned motions judge rightly addressed the issue of prejudice to the respondent. Although the specific evidence in respect thereof is not strong it is open to the Court to view any delay of this duration as being necessarily prejudicial in respect of any proof required by oral evidence.

We should observe that we do not adopt the view of the motions judge that the necessary parties were not before him. The parties to the grievance and the settlement were in fact before him: the union had not been a party before the adjudicator but participated only as adviser to the applicant.

Therefore, although we do not believe that some of the principles applied by the motions judge in the exercise of his discretion were correct in law, we are of the view that on the basis of the correct principles his discretion should have been exercised to the same effect, namely to refuse the extension of time. We therefore are dismissing the appeal.

J.A.