Federal Court of Appeal | Cour d'appel fédérale

Date: 20110916

Docket: A-450-10

Citation: 2011 FCA 253

CORAM: **NOËL J.A.**
NADON J.A.
STRATAS J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 14, 2011.

Judgment delivered at Ottawa, Ontario, on September 16, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Beaudry) dated November 10, 2010.

[2] Before the Federal Court, the appellant brought a motion for an extension of time to serve and file a notice of application for judicial review. She sought to set aside a decision made on

February 18, 2009 by the Public Service Staffing Tribunal. The Federal Court dismissed the appellant's motion.

[3] Section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 sets a thirty-day deadline for filing an application for judicial review. The appellant attempted to file her application some nineteen months after this deadline expired.

[4] The thirty-day deadline under section 18.1(2) of the *Federal Courts Act* is extendable by the Court as a matter of discretion. That discretion is guided by the principles set out in cases such as *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.), *Laurendeau v. Canada (A.G.)*, 2003 FCA 445 and *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249. These cases require us to consider four questions:

(1) Does the moving party have a continuing intention to pursue an application for judicial review?

(2) Has the responding party suffered any prejudice as a result of the moving party's delay?

(3) Has the moving party offered a reasonable explanation for the delay?

(4) Does the intended application for judicial review have any prospect of success?

[5] Only the appellant chose to file evidence on these questions. Her evidence shows that from the very day of the Tribunal's decision, she repeatedly took steps to try to find out whether the Tribunal's decision could be challenged and, if so, how. Among other things, on a number of occasions, she asked the Tribunal's staff what recourses were available to her. The Tribunal's staff advised her that the Tribunal's decision was final. It referred her to the privative clause in section 102 of the *Public Service Employment Act*, S.C. 2003, c. 22, which states that all decisions of the Tribunal are final. It did not tell her about the availability of judicial review to the Federal Court. The appellant says that the incomplete advice given by the Tribunal staff and her own review of section 102 caused her not to bring a timely application for judicial review. She adds that she could not afford to get legal advice from a lawyer.

[6] Later, as a result of finding a judicial review decision on the Tribunal's website, the appellant discovered that recourse could be had in the Federal Court by way of judicial review. Within one month of that discovery, she attempted to bring her application for judicial review and file it with the Federal Court. As she was out of time under section 18.1(2) of the *Federal Courts Act*, *supra*, she could not file her application. As a result, she brought a motion for an extension of time.

[7] The Federal Court dismissed the appellant's motion, finding that it was "not satisfied with the [appellant's] explanation for the delay." The Federal Court's reasons do not explain why it was not satisfied.

[8] In my view, it is not necessary to examine the Federal Court's finding about the appellant's explanation for the delay. This is because the appellant's motion fails on the alternate, equally fatal ground that her application has no prospect of success: see *Laurendeau*, *supra* at paragraph 2 and *Muckenheim*, *supra* at paragraph 8.

[9] The appellant provided the Federal Court and this Court with her intended application for judicial review. She intends to challenge the Tribunal's decision to dismiss a complaint she made about an alleged abuse of authority under subsection 77(1) of the *Public Service Employment Act*, *supra* concerning an appointment process at Statistics Canada. During that appointment process, she requested that a particular accommodation be made for her but she says that her request was mishandled. She says that certain guidelines were not followed. Further, her request was given to certain officials for input, but, in her view, they had the illegitimate objective of wanting to terminate her employment.

[10] The Tribunal dismissed the appellant's complaint because it was filed after a fifteen-day deadline. She filed her complaint fourteen months after the deadline had expired.

[11] The Tribunal considered whether it should nevertheless accept the appellant's late complaint. Based on the evidence before it, the Tribunal found that there were no exceptional circumstances preventing the appellant from filing on time. The Tribunal found that she had enough awareness of the unsatisfactory nature of the situation to bring a timely complaint. It based that factual finding on the documents before it. First, there was an email written by the appellant during the appointment process in which she expressed her dissatisfaction with the accommodation she was receiving. Second, in her complaint, she stated that she was not satisfied with the information she was getting during the informal discussion of her results in the appointment process. Third, before she received notification that she was unsuccessful in the appointment process, the appellant filed an access to information request seeking information from her employer.

[12] The appellant attempted to explain her delay by referring to the length of time it took her employer to satisfy the access to information request. The Tribunal rejected this as a satisfactory explanation, as it has done in other cases before it. In the Tribunal's view, problems that the appellant had in getting information to prove her case could have been remedied by filing her complaint and then using the Tribunal's procedural rules.

[13] Does the appellant's intended judicial review of this decision have any prospect of success? To answer that question, we must first consider the standard on which we are permitted to review the Tribunal's decision.

[14] In my view, it is incontestable that the Tribunal's decision must be reviewed on the deferential standard of reasonableness. Many of the factors identified by the Supreme Court as favouring deference apply to the Tribunal's decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. At the core of the Tribunal's decision is fact-finding, a matter on which the Tribunal is entitled to deference: *Dunsmuir*, *supra* at paragraph 53. Further, the Tribunal's decision involved a fact-based exercise of discretion, and here too the Tribunal is entitled to deference: *Dunsmuir*, *supra* paragraph 53. Finally, the Tribunal's decision is protected by a privative clause stating that its decisions are "final": *Public Service Employment Act*, *supra*, section 102. The privative clause is a "strong indication" that review should be conducted on the basis of the deferential standard of reasonableness: *Dunsmuir*, *supra* at paragraph 52.

[15] Under reasonableness review, the Court is not permitted to make its own decisions and substitute its views on these matters for those of the Tribunal. In particular, the Court is not permitted to redo the Tribunal's findings of fact and exercises of fact-based discretion. Rather, the Court is limited to considering whether the decisions of the Tribunal fall within a range of possible outcomes that are defensible on the facts and the law: *Dunsmuir*, *supra* at paragraph 47. Put another way, the Tribunal is entitled to "a margin of appreciation within the range of acceptable and rational solutions": *Dunsmuir*, *supra* at paragraph 47. As a practical matter, this Court can only interfere where the Tribunal has erred in a fundamental way.

[16] In her submissions, the appellant invites us to redo the Tribunal's findings of fact by reweighing the evidence, and then exercise our own discretion on whether the Tribunal should have

accepted her complaint. In particular, she urges us to find that, contrary to what the Tribunal found, she had insufficient awareness of the situation to file a timely complaint with the Tribunal. This sort of reweighing of evidence and exercising of discretion is precisely what we are not permitted to do under reasonableness review.

[17] Neither the evidentiary record nor the appellant's submissions raise an arguable issue that the Tribunal's decision is unreasonable. The Tribunal's decision, based on the facts and discretions described in paragraphs 11 and 12, above, is within the range of possible and defensible outcomes. The Tribunal's decision is reasonable.

[18] As the appellant's proposed judicial review has no prospect of success, her motion for an extension of time to file the application for judicial review must be dismissed.

[19] The appellant has raised one last issue before us. Mere days before the hearing of this appeal, the appellant gave notice of a constitutional challenge by way of a notice of constitutional question. She sought to challenge the validity of subsection 99(3) of the *Public Service Employment Act*, *supra*. That subsection allows the Tribunal to decide complaints without an oral hearing on the basis of written material alone. The appellant did not advance this constitutional challenge before the Tribunal or the Federal Court.

[20] The respondent brought a motion to strike the notice of constitutional question. Before us, the appellant complained about an irregularity in the delivery of the motion materials to her, but in

my view she received them in sufficient time before the appeal hearing; indeed, in advance of the hearing she was able to file written materials responding to the motion. After receiving the parties' oral submissions, this Court granted the respondent's motion and declined to consider the appellant's constitutional challenge. These are the Court's reasons for doing so.

[21] The appellant's constitutional challenge has not been advanced in a timely way and the factual record for the challenge is deficient: *Quan v. Cusson*, 2009 SCC 62 at paragraphs 36-49, [2009] 3 S.C.R. 712. Further, there is authority to suggest that where an administrative tribunal has the jurisdiction to decide a constitutional question, the constitutional question must first be raised before the tribunal: *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257. Finally, the record shows that while the matter was before the Tribunal the appellant did not object to the Tribunal determining the matter by way of written materials and did not request an oral hearing. She objected only after the Tribunal had made its decision.

[22] Before leaving this matter, I would like to offer a brief comment on the advice the Tribunal's staff gave to the appellant, mentioned in paragraph 5, above, and the possible confusion that resulted. I observe that many administrative tribunals have adopted the practice of releasing their decisions under a cover letter that advises of the availability of recourse against the decision and the deadline for pursuing that recourse, all in a single sentence. This practice has much to commend it, as it reduces the possibility of confusion and furthers access to justice.

[23] For the foregoing reasons, I would dismiss the appeal with costs.

"David Stratas"

J.A.

“I agree
Marc Noël J.A.”

“I agree
M. Nadon J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-450-10
APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE MICHEL BEAUDRY DATED NOVEMBER 10, 2010, NO. 10-T-37	
STYLE OF CAUSE:	Rachel Exeter v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 14, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Noël J.A. Nadon J.A.
DATED:	September 16, 2011

APPEARANCES:

Rachel Exeter	ON HER OWN BEHALF
Adrian Bieniasiewicz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT