Federal Court of Appeal | Cour d'appel fédérale

Date: 20190613

Docket: A-180-18

Citation: 2019 FCA 177

CORAM: **WEBB J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

ALEXANDRE POPOV

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 6, 2019.

Judgment delivered at Ottawa, Ontario, on June 13, 2019.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The applicant, Mr. Alexandre Popov, seeks judicial review of a decision of the Public Service Labour Relations and Employment Board (the Board) dated May 31, 2018 (2018 FPLREB 49), which dismissed his application for an extension of time to refer a grievance to the Board for adjudication under paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 [*Regulations*].

II. Background

[2] This matter concerns the applicant's termination from his position as an engineer at the Canadian Space Agency (CSA) effective April 28, 2014, and his subsequent grievance, which was heard at the final level by Mr. Luc Brûlé, Vice-President of the CSA on June 9, 2014. The grievor was unrepresented at the grievance hearing since he believed that, as an engineer, he was sufficiently competent to represent himself and did not need a bargaining agent.

[3] Mr. Brûlé dismissed the applicant's termination grievance on June 30, 2014. In so doing, he advised the applicant that should he disagree with the dismissal, he could refer the grievance to adjudication before the Board no later than 40 days after receipt, as provided under subsection 90(1) of the *Regulations*. The parties agree that the applicant did not receive Mr. Brûlé's decision until August 6, 2014, because he was out of the country visiting his ailing mother. Accordingly, the applicant should have filed his referral to adjudication before September 16, 2014. However, the applicant did not do so until October 21, 2015, nearly 13 months after the 40-day regulatory deadline had expired.

[4] In the intervening period, the applicant made several attempts to convince the CSA that its termination decision was misplaced. On August 6, 2014, he replied to Mr. Brûlé's final grievance decision with a long and detailed email reiterating that he did not understand the decision and repeating the reasons why he felt he should not have been terminated. From December 2014 to March 2015, the applicant sought letters of recommendation and support from other scientists and drafted a letter of intent for scientific research relating to the International

Space Station. On July 31, 2015, the applicant contacted the CSA's new President, Mr. Sylvain Laporte, to seek reconsideration of the dismissal of his grievance. The applicant pursued these informal processes because, to his mind, they were preferable to the formal adjudication process that was available to him before the Board.

[5] Upon receiving a notice of hearing before the Board, the applicant asked the Board to consider both his termination grievance and his request for an extension of time at the same time. The Board denied this request, finding that it would be a more efficient use of resources to first decide the timeliness issue. The applicant also requested that summonses for five witnesses be issued in advance of the hearing. The Board initially issued four of these summonses on March 20, 2018, but rescinded the summonses on March 23, 2018, after the CSA successfully argued that the witnesses called did not have knowledge of facts concerning the reasons for the applicant's delay in referring his grievance to the Board.

[6] Before the Board, the applicant submitted evidence that his delay in referring his grievance to adjudication was due to his recent diagnosis with a viral disease and that his mother suffered a severe illness. His mother passed away in 2016. The applicant also said that he did not pursue the formal grievance adjudication process because he preferred to resolve his grievance using informal conflict resolution.

III. The Board's Decision

[7] The Board denied the applicant's request for an extension of time. It did not assess the merits of the underlying termination decision and corresponding grievance. In reaching this

decision, the Board reviewed the evidence in light of the five criteria listed for consideration in the context of an extension decision found in *Schenkman v. Treasury Board* (*Public Works and Government Services Canada*), 2004 PSSRB 1 at para. 75 [*Schenkman*]: (1) whether there exist clear, cogent, and compelling reasons for the delay; (2) the length of the delay; (3) the due diligence of the grievor; (4) balancing the injustice to the employee against the prejudice to the employer in granting an extension; and (5) the chances of success of the grievance.

[8] The Board considered each criterion in turn. It first determined that the applicant's reasons for the delay were not clear, cogent, and compelling. The Board noted that he had not submitted medical evidence to support his viral disease diagnosis, and that in any event, "there was no evidence that the disease impeded filling out a form to refer the grievance to arbitration" (at para. 63). The Board similarly commented on the fact that despite his medical condition, the applicant had the ability to solicit support for his reinstatement from other scientists and to pursue scientific research projects. It also noted that while informal dispute resolution is to be encouraged at all levels in labour relations, the applicant's preference for such processes did not relieve his obligation to secure his right to utilize the formal grievance adjudication process through timely referral to the Board.

[9] The Board further found that 13 months is a "very long time" for the applicant to have waited to refer his grievance to the Board "without a compelling reason" (at para. 70). While the applicant may have applied diligence to his informal attempts to seek reinstatement, it found that he had applied "no diligence" to the grievance adjudication process itself (at para. 72).
The Board further noted that employers are entitled to rely on dispute resolution timelines,

and that it would be unfair to subject the CSA to a grievance adjudication procedure it no longer expected. The Board did not consider the applicant's chances of success because it found that they were impossible to predict without engaging in a complete assessment of the merits of the termination decision.

IV. Issue and Standard of Review

[10] The sole issue before this Court is whether it was reasonable for the Board to deny the applicant's request for an extension of time under paragraph 61(b) of the *Regulations*. The standard of review applicable to the Board's discretionary power to grant an extension of time under paragraph 61(b) of the *Regulations* is reasonableness (*Van Duyvenbode v. Canada* (*Attorney General*), 2010 FCA 66 at para. 11). To the extent that the applicant challenges the procedural fairness of the Board's decision to rescind the witnesses summonses, the question is whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54).

V. Analysis

[11] The applicant's submissions before this Court reiterate his view that he was wrongfully dismissed, and that CSA should not have denied his grievance. With respect to the issue of the extension of time, the applicant says that there were valid and sound reasons for the delay, in particular his diagnosis with a viral disease and his mother's illness. He says that the Board did not properly assess the ways that these factors impacted his ability to navigate the legal process for seeking adjudication, and further, that the Board improperly declined to consider his

grievance's chances of success. He also says that the Board's decision to rescind his witness summonses was unfair and undermined the Board's ability to ensure an honest examination of the facts. I will consider each argument in turn.

[12] In my view, the applicant has not established that the Board committed any error in dismissing his request for an extension of time to refer his grievance to adjudication. The Board's jurisprudence establishes that requests to extend timelines under paragraph 61(b) of the *Regulations* are only allowed sparingly (*Cloutier v. Canada* (*Treasury Board - Department of Citizenship & Immigration*), 2008 PSLRB 31 at para. 13). In the present matter, the Board assessed each of the *Schenkman* criteria and found that the interests of fairness did not militate in favour of the applicant. I essentially agree with the Board's reasons, and would not intervene.

[13] The Board considered the applicant's argument and evidence that his viral illness and his mother's failing health prevented him from referring his grievance to adjudication. However, the Board ultimately found that these circumstances did not prevent the applicant from filing a grievance referral form, noting that the applicant was "still active enough to contact other space scientists for letters of recommendation and to pursue scientific research projects" (at paras. 80-81). Likewise, this Court notes that despite the fact that the applicant received his initial diagnosis in 2012, he continued to work for the respondent throughout 2013 and up to April 2014, when he was dismissed. These facts indicate that despite any limitations the applicant may have faced as a result of his diagnosis, he was able to follow the steps necessary to identify and complete the necessary form to refer his matter to adjudication.

[14] Moreover, I agree with the Board's conclusion that the inconvenience that an extension would impose on the CSA outweighed the applicant's reasons for his tardiness. As the Board properly stated, "the employer is entitled to turn the page when it believes a matter has been settled once and for all" (at para. 76). This is especially true, in my view, after a lengthy period of 13 months has passed.

[15] Further, I do not agree with the applicant's position that it was improper for the Board to decline to consider the fifth *Schenkman* criterion relating to the applicant's chances of success. Relying on its decisions in *Grouchy v. Deputy Head* (*Department of Fisheries and Oceans*), 2009 PSLRB 92 and *Cowie v. Deputy Head* (*Correctional Service of Canada*), 2012 PSLRB 14, the Board noted (at paras. 78-79) that the fifth criterion is not often considered unless it is clear that the grievance has little to no chance of success. The Board had insufficient evidence before it relating to the circumstances of the termination that would allow it to decide the applicant's chances of success. Indeed, it would only be fair to engage in such a complex assessment with the benefit of a full evidentiary record concerning the termination, which would essentially amount to the adjudication of the merits of the grievance contrary to the intention of the Board when it decided to bifurcate these issues. Accordingly, in my view, the Board properly declined to consider the applicant's chances of success in the circumstances.

[16] Likewise, in my view, the Board did not err when it acceded to the respondent's request to rescind the four witness summonses. In its reasons, the Board reviewed the relationships of these witnesses to the applicant and his termination and subsequent grievance process, and determined that the testimony they were likely to provide had little or no relevance to the

extension of time issue and rescinded the witness summonses (at paras. 13-16). I am not convinced that the decision to rescind was unfair in the circumstances, particularly as it appears the applicant had the opportunity to respond to the respondent's rescindment request and did in fact present his objections to this request in a series of emails dated March 26, 2018 (Respondent's Record, Vol. 1, Tab 1C at pp. 69-71).

VI. Conclusion

[17] For these reasons, I would dismiss the application. The respondent did not seek costs, and I would award none.

"D. G. Near"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD DATED MAY 31, 2018, CITATION NO. 2018 FPSLREB 49

DOCKET:	A-180-18
STYLE OF CAUSE:	ALEXANDRE POPOV v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 6, 2019
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	WEBB J.A. BOIVIN J.A.
DATED:	JUNE 13, 2019

APPEARANCES:

Alexandre Popov	ON HIS OWN BEHALF
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