Federal Court of Appeal | Cour d'appel fédérale

Date: 20220608

Docket: A-220-20

Citation: 2022 FCA 107

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

ÉRIC MANNEH

Applicant

and

UNIFOR

Respondent

Heard at Montréal, Quebec, on June 7, 2022.

Judgment delivered at Montréal, Quebec, on June 8, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, the applicant seeks to set aside the decision of the Canada Industrial Relations Board rendered on February 18, 2020 (2020 CIRB LD 4287). The Board determined that the applicant's complaint was untimely because it had been filed after the 90-day time limit set out in subsection 97(2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2

(the *Code*). The Board also determined that the applicant's complaint, alleging a lack of fair representation pursuant to section 37 of the *Code*, was without merit.

[2] This application for judicial review must be dismissed principally because it was not filed with this Court until September 21, 2020, which is well outside the applicable 30-day time limit set out in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicant did not file any application to extend this time limit and gave no valid reason for his delay. Consequently, there are no grounds to extend the time limit for filing the application for judicial review.

[3] Further, even if there had been grounds to extend this time limit, this application would nevertheless have been dismissed for the following reasons.

[4] Courts have consistently held that the reasonableness standard of review applies to decisions such as the one at issue in the present case (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 16 [*Vavilov*]; *Lairenjam v. Unifor National Council 4000*, 2020 FCA 96, at paras. 7 and 9; *FedEx Freight Canada, Corp. v. Teamsters Local Union No. 31*, 2017 FCA 78, at para. 23; *Fairhurst v. Unifor Local 114*, 2017 FCA 152, at para. 21).

[5] In this case, the Board's decision is reasonable because it is well-reasoned and because the Board followed its prior decisions and drew reasonable factual conclusions that are supported by the facts that were before it.

[6] Subsection 97(2) of the *Code* sets out a strict requirement that complaints must be made to the Board within 90 days. The Board has repeatedly held that this time limit will begin to run from the moment that the complainant knew, or in the opinion of the Board ought to have known, of the circumstances giving rise to the complaint (see *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151, at para. 32; *Lang v. Canadian Union of Postal Workers*, 2017 CIRB 848, at para. 71). The Board has also repeatedly held that subsequent confirmation of a union's previous decision or a fresh denial does not restart the 90-day time period (see *Pinel*, 1999 CIRB 19, at paras. 17 and 18; *Blakely*, 2003 CIRB 241, at para. 24; *Payton v. Teamsters Local Union 938*, 2013 CIRB 673, at para. 40; *Frank Scrivo et al. v. TC Local 1976 USW*, 2016 CIRB 833, at para. 68).

[7] In this case, the Board found that the date by which the applicant knew or ought to have known that the respondent would not be pursuing the judicial review of the arbitral award was December 12, 2018, namely, the date on which the respondent indicated that it would not be pursuing its application for judicial review before the Superior Court of Québec. The Board determined that, contrary to what the applicant argued to the Board, the 90-day time limit did not begin to run when the respondent abandoned its application to the Superior Court. The complaint was not made to the Board until April 16, 2019. Consequently, the Board determined that it was time-barred.

[8] Before this Court, the applicant argues that the Board refused without reason to exercise its discretion to extend the time limit for filing the complaint, under paragraph 16(m.1) of the *Code*, because his counsel was allegedly negligent in calculating the time limit. He adds that the

Board should have understood that he could not reasonably have known that the respondent would not be pursuing the proceeding before the Superior Court until he received a reply to his email dated December 14, 2018, requesting leave to pursue the proceeding at his own expense.

[9] The applicant did not raise these arguments before the Board, but he could have done so. Given that a reviewing court will not examine an issue on judicial review that could have been but was not raised before the administrative decision-maker, the applicant cannot now make these arguments to this Court (see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 21 to 26; *Canada (Attorney General) v. Valcom Consulting Group Inc.*, 2019 FCA 1, at para. 36; *Oleynik v. Canada (Attorney General)*, 2020 FCA 5, at para. 71; *Sigma Risk Management Inc. v. Canada (Attorney General)*, 2022 FCA 88, at para. 6).

[10] Further, it seems to me that some of these arguments would have been bound to fail before the Board in any event because any party that fails to meet the 90-day time limit to make a complaint to the Board may well have been negligent. Furthermore, as the Board noted in this case, to be granted an extension of time, an applicant must demonstrate that there were compelling circumstances, which were not presented to the Board (see *Maria Antonia Jaime v. CanJet Airlines, a division of I.M.P. Group Limited*, 2017 CIRB 864, at para. 90; *Torres*, 2010 CIRB 526, at paras. 18 to 22).

[11] Finally, considering the facts in this case, and particularly that the respondent decided not to pursue the application for judicial review of the arbitral award after receiving an external legal

opinion that the application for judicial review had only a very small chance of success, the Board's finding that the complaint was without merit appears to me to be beyond reproach.

[12] I would add in closing that, as the Supreme Court of Canada reiterated in *Vavilov*, a court's role in deciding an application for judicial review and in applying the reasonableness standard is not to re-decide the case. In other words, a court "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem." Instead, it must "consider only whether the decision made by the administrative decision maker—including both the rationale for the decision and the outcome to which it led—was unreasonable" (*Vavilov*, at para. 83). As I have already stated, in this case, I am satisfied that the Board's decision was reasonable in light of the record that was before it.

[13] For these reasons, I would dismiss the application for judicial review. In the circumstances, I would make no costs award.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BOIVIN J.A. LEBLANC J.A.
DATED:	JUNE 8, 2022

APPEARANCES:

Éric Manneh	ON HIS OWN BEHALF
Daphné Blanchard-Beauchemin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Unifor Montréal, Quebec	FOR THE RESPONDENT