Date: 20071114

Docket: T-1873-06

Citation: 2007 FC 1182

Ottawa, Ontario, November 14, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PAUL VIDLAK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Vidlak, representing himself, sought judicial review of a decision of the Chairperson of the Public Service Labour Relations Board, dated August 14, 2006. In that decision, the Chairperson denied Mr. Vidlak's request for an extension of time in which to bring a grievance against his former employer, the Canadian International Development Agency (CIDA). At the hearing on September 6, 2007, I dismissed the application with brief oral reasons which I now will provide in writing with the addition of particulars and authorities.

BACKGROUND:

[2] Mr. Vidlak was employed by CIDA as a senior project officer in its Eastern and Central Europe Branch from November, 1998. In January, 2001, in the course of a performance review, Mr. Vidlak was instructed by his Director to find a new position in CIDA or in another department. An unsigned statement from the Director dated January 24, 2001, refers to this as a consequence of following-up on the recommendation of his last two performance evaluations.

[3] Mr. Vidlak alleges that this directive to find another job stemmed from questions he had raised about financial arrangements with foreign recipients of CIDA grants and the lack of oversight from CIDA respecting those matters. Mr. Vidlak did not then seek to grieve the Director's instruction nor has he filed any contemporaneous documentary evidence supporting his allegation. He says that he had made informal inquiries with his union but was not advised that he could pursue a grievance action.

[4] After a series of temporary secondments to other departments, Mr. Vidlak was informed in July 2003 that his position at CIDA was being terminated because of the decline of program activities. He then accepted a deployment to his present position in another department. Mr. Vidlak did not grieve the termination of his position at CIDA. The applicant says that he was trying to find an accommodation with CIDA management and wished to avoid a confrontation. To this end, he says, "numerous pieces of correspondence" were exchanged with CIDA officials and meetings were held to discuss his settlement proposals. Again, none of the correspondence or other supporting documentation has been filed in these proceedings.

[5] In October, 2003, Mr. Vidlak wrote a letter to the Minister then responsible for CIDA raising concerns about the agency's supervision of aid recipients. The Minister subsequently commissioned a study of these complaints by an independent consulting firm. Mr. Vidlak received a copy of the resulting report (the BMCI report) on February 28th, 2005. The report validated his concerns, at least in part, and recommended changes in procedure. Mr. Vidlak asserts that he then made inquiries of his union on how best to address the issue of his dismissal but that the union delayed in responding to him.

[6] On October 18, 2005 the union informed Mr. Vidlak that it would not pursue his claim as it was considered out of time. He was subsequently advised that he could seek an extension of time for filing his grievance under paragraph 61(b) of the *Public Service Labour Relations Board Regulations*.

[7] Mr Vidlak is a member of the Public Service Alliance of Canada (PSAC). Under the collective agreement which governed his employment, he had a window of 25 days during which to file a grievance. Pursuant to section 61 of the *Regulations*, time limits imposed by such agreements may be extended, either by agreement of the parties (s. 61(a)) or, by the Chairperson on the application of one of the parties in the interest of fairness (s. 61(b)).

[8] The applicant wrote to the Board on November 15, 2005 requesting an extension of time pursuant to s. 61(b) within which to file a grievance with respect to the treatment he received from CIDA in 2002. It appears clear from the record that this was a simple error and that Mr. Vidlak was

referring to the sequence of events from the January 2001 performance review and direction to find new employment to the July 2003 termination of his position.

[9] Treasury Board Secretariat objected to acceptance of the grievance because of the passage of time and resulting prejudice to the employer. In subsequent correspondence, the Secretariat sought particulars from Mr. Vidlak to explain the delay and provided evidence of prejudice suffered as a result of the departure of officials with knowledge of the circumstances. By letter dated May 23, 2006 Mr. Vidlak stated that he had delayed in filing a grievance for two reasons which I paraphrase and summarize as follows:

1. he is not a confrontational individual and had sought to reach a settlement with CIDA officials; and

2. things changed when he received a copy of the BMCI Report confirming his concerns and exposing management's actions towards him as spiteful and ill-founded.

DECISION:

[10] In reasons for decision dated August 14, 2006 the Board Chairperson refused Mr Vidlak's request for an extension on the grounds that he had failed to meet the criteria for the exercise of discretion pursuant to s. 61(b) as set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. These criteria are:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the employer; and
- chance of success of the grievance.

[11] The Chairperson found that the applicant had failed to provide cogent reasons explaining the delay and justifying why he should be relieved of the consequences of his failure to file a grievance on time. Even if the release of the BMCI Report was to be taken as the date for calculation of the delay, the applicant was still nine months short and provided no explanation except to say that he has a non-confrontational personality. This, the Chairperson concluded, is not a clear, compelling and cogent reason for the delay. Further, the applicant had neither proven due diligence nor provided any evidence of a credible chance of success. No evidence had been provided of the applicant's communications with his union from which it might be concluded that he had been misled in any way.

ISSUES:

[12] The issue in these proceedings was whether the Chairperson erred in refusing to exercise discretion to grant the extension of time. In doing so, the applicant submits, he was denied procedural fairness.

ANALYSIS:

[13] Where the exercise of statutory discretion is at issue, the courts should not interfere where the discretion was exercised in good faith, in accordance with the principles of natural justice, and was not based on irrelevant or extraneous considerations: *Maple Lodge Farm Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558.

[14] The Federal Court of Appeal recently reviewed the pragmatic and functional approach to the standard of review as applied to questions of mixed fact and law decided by the PSLRB, and held

that it was one of patent unreasonableness: *McConnell v. Professional Institute of the Public Service of Canada*, 2007 FCA 142, [2007] F.C.J. No. 507 at paragraphs 12 – 18. As stated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan* 2003 SCC 20, [2003] 1 S.C.R. 247 at paragraph 52 a decision that is patently unreasonable is one that is clearly irrational and so flawed that no amount of curial deference can justify letting it stand.

[15] On the issue of procedural fairness, however, the standard is strict, allowing for no level of curial deference: *Slattery v. Canada (Canadian Human Rights Commission) (T.D.)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181.

[16] The applicant submits that he has provided a satisfactory explanation for the delay, most of which he asserts was due to circumstances beyond his control. This explanation included: that he was attempting to resolve the issue by alternative dispute mechanisms as he is a non-confrontational person; that he was not able to bring his grievance until after the release of the BCMI report; that the filing of the grievance was postponed by the long delay in his union's response to his request; and, that he was unaccustomed to the grievance process and unaware of the deadlines.

[17] Mr. Vidlak states that he further demonstrated due diligence and a continuing intention to pursue the matter. The findings of the Board that he had failed to provide evidence of the same were not in accordance with natural justice, as, he submits, the Board should have notified the self-represented applicant that such evidence would prove helpful to his case.

[18] The respondent, on the other hand, argues that Mr. Vidlak failed to provide valid reasons to support an extension to the time limits and that the Chairperson correctly applied the criteria developed by the jurisprudence: *Schenkman*, above. It is clear from her decision that she took into account all the considerations raised by the applicant. It was correct for the Chairperson to conclude that the applicant's reasons for failing to begin a grievance were not clear, compelling and cogent. The applicant simply chose not to use the appropriate redress mechanism available to him.

[19] Mr. Vidlak had several opportunities to grieve against his treatment by the management of CIDA, including the time at which he was advised to seek alternate employment and the point at which he was advised that his position was being terminated, and possibly, although I think it doubtful, upon the release to him of the BMCI Report, as the Chairperson suggested. In my view, the latter occasion simply provided evidence upon which he could possibly have relied in support of his complaints about the earlier events. As he had direct personal knowledge of those events, I question whether he could properly claim to have had notice of the basis for his grievance only from the release of that report.

[20] But supposing that premise to be valid for the present, from each of these possible starting points there was a 25-day window in which Mr. Vidlak could have brought his grievance to the PSLRB. He did not, and the delay between the initial controversy and this application has grown sufficiently wide to make his burden quite substantial.

[21] The onus was on Mr. Vidlak to establish due diligence in pursuing his grievance to demonstrate that it had a fair chance of success and to provide clear, cogent and compelling reasons

for the delay. Mr. Vidlak provided no documentary record to substantiate his claim that he had been actively pursuing the matter of his dismissal from the outset such as the “numerous pieces of correspondence” exchanged with CIDA officials or his e-mails to and from union representatives.

[22] Mr. Vidlak submits that to establish a reasonable chance of success it was sufficient for him to have informed the Board of the BMCI Report. Having read the excerpts of the BMCI Report filed in evidence on this application, together with Mr. Vidlak’s hand-written annotations, it is not clear to me that it establishes a nexus between his performance review in January, 2001 and the subject of his complaints to the Minister in October, 2003. At best, it confirms that some of his disclosures in 2003, after his position was terminated, were well-founded. The applicant did not provide a sufficient evidentiary basis to draw the inference that his negative performance review in 2001 was connected to the concerns he raised more than two and a half years later. The Chairperson did not err, in my view, in concluding that the applicant had not established that his grievance had a credible chance of success.

[23] When provided the opportunity to provide adequate particulars of the reasons for his delay, Mr. Vidlak simply repeated his claims and assertions. It was not enough to claim that he is by nature non-confrontational and that this should be taken as an explanation for his failure to act. The Chairperson reasonably found, based upon his own words, that Mr. Vidlak had chosen not to challenge his dismissal and had elected to pursue alternative avenues to seek a remedy. In my view, he cannot now complain of unfair treatment by the Board as a result of his own decisions.

[24] Based on the evidence before her, the Chairperson concluded that she was unable to grant the extension sought by Mr. Vidlak. I find that the Chairperson's findings in applying the *Schenkman* test were not patently unreasonable, and, accordingly, I will not set her decision aside.

[25] As for Mr. Vidlak's argument that the Board should have notified him that particular pieces of evidence may have benefited his case, in an ideal world this would be the case. The reality is that tribunals do not have the resources to lead each self-represented applicant by the hand through the process. The burden is upon them to provide evidence to support their claims, particularly where, as here, a grievance is out of time and an extension is sought. When the union chose not to become involved, Mr. Vidlak would have been well advised to have sought legal advice.

[26] The respondent is not seeking costs and none will be awarded.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that this application is dismissed without costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1873-06
STYLE OF CAUSE:	PAUL VIDLAK AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 6, 2007
REASONS FOR JUDGMENT:	MOSLEY J.
DATED:	November 14, 2007

APPEARANCES:

Paul Vidlak	FOR THE APPLICANT (Self-represented)
Karl Chemsi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

PAUL VIDLAK Ottawa, Ontario	FOR THE APPLICANT (Self-represented)
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT