Federal Court		Cour fédérale

Date: 20080219

Docket: T-1279-07

Citation: 2008 FC 216

Montréal, Quebec, the 19th day of February 2008

Present: The Honourable Mr. Justice Martineau

BETWEEN:

MICHEL AUBERT

Applicant

and

TRANSPORT CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] By this application for judicial review, the applicant is contesting the legality of a decision handed down on June 15, 2007 (the impugned decision) by Linda Brouillette, director general of Human Resources (the administrative decision-maker) at Transport Canada (the Department), dismissing the applicant's grievance on the grounds that it was time-barred and, in any event, without merit.

[2] In *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*, [2002] F.C.J. No. 1008 (QL), 2002 FCA 284, the Federal Court of Appeal stated that the temptation to characterize certain issues as

"jurisdictional" for the purpose of attracting a less deferential standard was to be resisted. In this case, the administrative decision-maker has the authority to decide if a complaint is time-barred and is better placed than the Court to make a decision regarding "the date on which [the applicant] is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to grievance" in accordance with Article 35.09 of the collective agreement between the Treasury Board and the Canadian Federal Pilots Association (the collective agreement) which provides for a 25-day period for the filing of a first-level grievance.

[3] Having considered the existence of a privative clause, the relative expertise of the administrative decision-maker, the objective of the Act in question and the nature of the problem, I conclude first that the standard of review applicable to a decision dismissing a public servant's grievance filed under section 208 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act) for reasons of lateness is that of patent unreasonableness (*Trépanier v. Canada (Attorney General)*, [2004] F.C.J. No. 1601 (QL), 2004 FC 1326; *Desloges v. Canada (Attorney General)*, [2007] F.C.J. No. 85 (QL), 2007 FC 60). On the other hand, it is the standard of correctness that applies to the interpretation or the particular scope that the administrative decision-maker may give to the *Values and Ethics Code for the Public Service* (the Code) (*Canada (Attorney General) v. Assh*, [2006] F.C.J. No. 1656 (QL), 2006 FCA 358). Lastly, the question of whether there is in fact a conflict of interest (real or apparent) seems to call for a greater degree of deference, so that this last aspect must be reviewed according to the reasonableness *simpliciter* standard.

[4] The reasons and the circumstances surrounding the applicant's grievance are clearly set out in the affidavits submitted by the respondent. The predominant evidence in the record indicates that

the applicant filed his grievance more than two years after having been informed of the Department's position with respect to his request to hold more than one job simultaneously. The administrative decision-maker's decision of lateness is supported by the evidence in the record. It does not seem to me to be patently unreasonable in the circumstances.

[5] Indeed, as early as 2004, the Department notified the applicant in writing that he was not authorized to work as a pilot for foreign companies outside his regular working hours since such activity could lead to a perception of conflict of interest, which is what the applicant is contesting today. Subsequently, in her letter of February 20, 2006, Nicole Pageot, director general of the Quebec region, further specified as follows: [TRANSLATION] "The only occasions where a civil aviation inspector is allowed to fly an aircraft during days off or outside working hours are where the inspector is flying a private plane for recreational purposes, or renting a plane for personal reasons, or when the flights occur within an approved alternative training program, which cannot be the case here." Now the applicant wishes to submit that this decision is unreasonable in that the exceptions mentioned are too restrictive.

[6] In a letter dated August 22, 2006 sent by the applicant's counsel, Marc Grégoire, Nicole Pageot, Merlin Preuss and Yves Gosselin of the Department are collectively invited to [TRANSLATION] "please review your decision as soon as possible". Since there were no new facts and no new confidential report was produced under the Code, the present administrative decision-maker, Ms. Brouillette, did not act in an arbitrary or capricious way by treating the applicant's counsel's request as a late application for review. Indeed, the starting date of the limitation period is not postponed simply because the administrative decision-maker agrees to reply anew to a request

concerning which she has already taken a final position, which is the case here. The Department's position has not changed and has always been the same. It was up to the applicant to file a formal grievance within the 25-day period provided for in the collective agreement if he wished to contest the validity of that position.

[7] Counsel for the applicant pleads today before this Court that the applicant's grievance is not time-barred since it constitutes in fact an [TRANSLATION] "ongoing grievance." But the contrary position argued here by counsel for the respondent does not seem to me to be unreasonable since it can be supported by case law and by doctrine. Indeed, it is not a case where [TRANSLATION] "the benefits of the collective agreement are being claimed in a context where the work underlying this claim is to be carried out successively and where the breach of the collective agreement is recurrent or repetitive." (Rodrigue Blouin and Fernand Morin, *Droit de l'arbitrage de grief*, 5th edition (Les Éditions Yvon Blais inc., 2000), at paragraph V.55, at pp. 311-12). Learned counsel for the applicant draws a parallel with an employer's refusal to allow an employee to work overtime or to recognize an employee's work experience gained with other employers. However, these last examples seem to me to be factual situations very different from the case being examined. The main object of the applicant's grievance is the legality of a firm decision at a fixed point in time not to allow him to work during weekends for foreign companies, subsequent to the filing of a confidential report by the applicant in 2004.

[8] Considering my conclusion with regard to the question of limitiation, it is not necessary to review the legality of the administrative decision-maker's alternative conclusion that in any event, the applicant's grievance is without merit. Nonetheless, since the parties dwelled at length during the hearing on the question of conflict of interest, I would specify here that the applicant did not

convince me that a well-informed person, having studied in depth the question of conflict of interest, in a realistic and practical manner, would arrive at a different conclusion from that of the administrative decision-maker. (*Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41). Having considered the evidence in the record, including the applicant's job description, as well as the ethical values in the Code, I agree with the administrative decision-maker's general conclusion. It seems to me to be reasonable in the circumstances.

[9] I do not believe that the legality of the impugned decision rests on an incorrect interpretation of the provisions of the Code. In any case, the Code has relative legal weight and does not confer any rights on the applicant. In this case, the provisions in the Code with respect to conflicts of interest are not part of the collective agreement. Nor do I believe that it is necessary to distinguish between a real and an apparent conflict of interest. In my view, both types of conflict are clearly contemplated by the Code. The refusal to allow the applicant to hold two jobs is within the Department's authority. This is a case where the public interest must prevail over the applicant's personal interest and where the applicant's conduct must stand up to the most thorough public scrutiny.

[10] In conclusion, the applicant must arrange his personal affairs so as to avoid any type of conflict of interest, real, apparent or potential. It is therefore reasonable to find, as indeed did the administrative decision-maker, that [TRANSLATION] "the fact [of] authorizing [the applicant] to fly aircraft for foreign companies during [his] free time could lead to a perception of conflict of interest" and that "[m]ore specifically, this situation of double employment could, among other things, raise questions of loyalty to Transport Canada, of dual commitment and of public interest."

[11] For these reasons, the application for judicial review must be dismissed. Considering the result, the respondent shall be entitled to its costs.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed with costs to the respondent.

"Luc Martineau"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1279-07
STYLE OF CAUSE:	**MICHEL AUBERT v. TRANSPORT CANADA**
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DATED:	February 19, 2008

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