Date: 20071107

Docket: 07-T-18

Citation: 2007 FC 1159

Ottawa, Ontario, November 7, 2007

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

JANET GOVER

Applicant

And

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
as represented by Treasury Board and Canada Border Services Agency

Respondents

REASONS FOR ORDER AND ORDER

[1] Janet Gover seeks an extension of time to file an application for judicial review of a decision of the Canadian Human Rights Commission dated July 26, 2005. The decision summarily dismissed part of her complaint against her employer, on the basis that it related to acts which occurred more than one year before the filing of the complaint (paragraph 41(1) (*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, hereinafter the Act).

[2] There is no dispute as to the applicable legal principles on such a motion. The four-pronged test requires the applicant seeking such an extension to show:

(1) a continuing intention of pursuing his or her application;

(2) that the application has some merit (arguable case);

(3) a reasonable explanation for the delay;

(4) that there is no prejudice to the other party in allowing the extension.

(*Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (QL); *Canada (Minister of Human Resource Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. 37 (QL); *Smith v. Via Rail Canada Inc*. 2007 FCA 286, [2007] F.C.J. No. 1176 (QL).)

[3] As noted by Justice Gilles Létourneau in *Hogervorst*, above, at paragraph 33,

> This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Min. of Employment and Immigration)*, [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada*, *supra*, at pages 278-279.

1. BACKGROUND

[4] Ms. Gover is a customs inspector who, as mentioned, filed a complaint with the Commission against her employer, the Canada Border Service Agency, on March 5, 2005.

[5] In her affidavit of March 15, 2007, she summarized the issues raised in said complaint as follows:

(i) first, I was discriminated against on the ground of disability because I was forced off the employer's Injury on-duty leave program and thus unlike employees with short term disabilities who remain on the program and non-disabled employees, I was no longer fully compensated for the hours which I could not work as a result of my injury.[1]

(ii) second, my employer failed to provide physical modifications in the workplace to accommodate my disability.

[6] Although Ms. Gover was first injured in the workplace in January 1991 and was for a short period placed on Leave without pay, she returned to work part-time (3.75 hours per day) in April 1992 and had increased her work hours to 5.25 hours per day by May 25, 1992.

[7] Since June 8, 1992, she has received her full salary from her employer for the 26.25 hours she actually works every week. This portion of her salary increases in accordance with the provisions of the applicable collective agreement. In respect of the remaining 11.25 hours which she does not work, she is paid under the Leave without pay program directly by the Workplace Safety and Insurance Board (WISB), to the extent of 90% of the net salary she was earning at the time she became disabled. [2]

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[1] According to the employer's policy, an employee with a disability or injury will receive her full salary (paid mostly by the Workplace Safety and Insurance Board but with a top up from the employer for a maximum period of 133 days (this is referred to as the Injury on duty leave program). After that period, the disabled or injured employee will be placed on the Leave without pay program.

[2] This amount is indexed as per the *Ontario Workplace Safety and Insurance Act*, formerly the *Ontario Workers Compensation Act*.

[8] In her affidavit, Ms. Gover says that she continuously complained to her employer regarding this arrangement in 1993-1994 [3]and effectively filed grievances in 1998, 1999 and 2000. It is not clear, however, whether all of these grievances actually related to the decision to place her on the Leave without pay program, as opposed to various administrative errors in the pay mechanics described in her complaint.[4] In any event, such grievances were unsuccessful in that they were withdrawn by the Public Service Alliance of Canada (PSAC) following a failed mediation in June 2004. The applicant says that the discriminatory nature of the Leave without pay could not be raised before an adjudicator under the *Public Service Staff Relations Act,* because at the relevant time such adjudicators had no jurisdiction to consider "human rights law".

[9] Although more details in respect of the above-noted mediation and the nature of these grievances appear to have been given to the Commission during the course of the preliminary investigation, no such details were included in the applicant's motion record, and the applicant's counsel could not shed more light on these matters at the hearing.

[10] After receiving the complaint, the Commission's investigator wrote to the parties and advised Ms. Gover on April 20, 2005, that the alleged adverse differential treatment regarding her wages appeared to be based on events that took place between 1992 and 2000. Hence, the complaint would be presented to the Commission with the recommendation that pursuant to

[3] In her complaint, she notes only that in 1993-1994 she continued to express her physical discomfort and to request modification to her work station.

[4] For example, in her complaint, Ms. Gover says that the grievance filed in 2000 related to an error in her T-4. Be that as it may, it appears that the Commission considered all events relating to salary as one, as the investigator refers to "events that ttook place between 1992 and 2000" on the letter of April 20, 2005 (see para. 10).

subsection 41(1)(e) of the Act, the Commission decline to deal with Ms. Gover's allegations of discrimination in this regard for reasons of timeliness.

[11] The second portion of her claim, that is the alleged failure of her employer to reassign her or provide her with specific equipment to alleviate or accommodate her disability or injury, is not the subject of this judicial review, as the Commission agreed that this aspect of the claim was a matter of continuing discrimination and therefore not untimely. However, in the letter of April 20, 2005, Ms. Gover was informed that in accordance with paragraph 41(1) (*a*) of the Act, the investigator would recommend that the Commission decline to deal with this portion of the complaint until the applicant had exhausted grievance or review procedures provided by the applicable collective agreement. The parties were given until May 16, 2005, to present their submissions in respect of the investigator's report.

[12] On May 19, 2005, a legal counsel in the Membership Program Branch of the PSAC replied on behalf of Ms. Gover, countering that the adverse differential treatment alleged with respect to wages was not out of time, as it was an ongoing treatment that re-occurred each time the applicant was paid. He also explained that there was no other forum available to Ms. Gover to pursue her complaint, as she had already attempted to file a grievance in respect of her employer's behaviour and the PSAC had withdrawn said grievance because at the relevant time the collective agreement did not recognize the manner in which the employer paid Ms. Gover as a violation of its provisions.

[13] On July 26, 2005, the Commission issued its decision in this matter. It stated:

> Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided pursuant to subsection 41(1) of the *Canadian Human Rights Act*, to deal only with the allegation of a failure to accommodate your disability.
>
> The Commission further decided, pursuant to paragraph 41(1)(*a*) of the *Canadian Human Rights Act*, not to deal with the complaint at this time because:
>
> - *the complainant ought to exhaust grievance or review procedures otherwise available. At the termination of these procedures, or if they prove not to be reasonably available, the Commission may exercise its discretion to deal with the complaint at the complainant's request*
>
> Please note that, if you are not satisfied with the final outcome and you wish to pursue the matter, you must contact the Commission as soon as possible.
>
> The file on this matter has now been closed.
>
> (my emphasis).

[14] For some reason, the decision was not sent to PSAC, only to Ms. Gover. She received it at home while she was on holiday. Upon her return on August 12, she forwarded it to PSAC. The legal counsel assigned to the file, Mr. Craig Spencer, was on leave. Because the letter did not include the usual statement of the Commission informing the complainant of the availability of judicial review before the Federal Court, the person handling the file in Mr. Spencer's absence understood from the statement beginning "if your are not satisfied with the final outcome…", that it was open to Ms. Gover to request a reconsideration of her complaint by the Commission.

[15] A series of telephone conversations, e-mails and correspondence ensued between PSAC and the Commission's staff which, according to the affidavits of Seema Lamba (the counsel at PSAC who dealt with the file on August 12, 2005) and Craig Spencer, apparently led the applicant and her counsel to believe that the matter was under consideration at the Commission and that the file had indeed been reopened in its entirety. In fact, in January 2006, Craig Spencer met with Ms. Shukuru, an investigator at the Commission, to discuss among other things the issue of continuing contraventions, and to provide her with material from the grievance file as well as case law dealing with the loss of full wages.

[16] Mr. Spencer was later advised by Ms. Shukuru that the Commission was seeking an outside legal opinion and in April 2006 that such opinion had been received. On November 16, 2006, the staff of the Commission verbally informed Mr. Spencer that the Commission would not reconsider its decision. The letter confirming this position was sent on December 18, 2007. The letter specifically states that pursuant to the Act, the Commission has no jurisdiction to reconsider its own decision, but that the applicant's formal request for reconsideration dated October 18, 2005 would be processed as a request to return from alternate redress in respect of the failure to accommodate.

[17] In her affidavit, Janet Gover indicates that she only learned in January 2007 (no precise date mentioned) that she had to file an application for judicial review with respect to the Commission's decision of July 26, 2005.

[18] According to the affidavit of Mr. Spencer, who was apparently on leave when the Commission's letter was received in December, he contacted outside counsel upon his return on January 9, 2007 to request an opinion on the possibility of obtaining an extension of time to file an application for judicial review. The motion seeking such an extension was filed on March 26, 2007.

[19] The only evidence accounting for the period between January 9, 2007 and March 26, 2007 is a single paragraph in Craig Spencer's affidavit which states that: "the process and the preparation of the motion took a considerable amount of time because of the difficulty in getting information and records from the period when the Applicant's injury occurred and the differential treatment began, the number of individuals involved in the case who will be providing affidavits, and the fact that the applicant lives in a different city."

2. ANALYSIS

[20] The respondents do not dispute that Mrs. Gover had a continuing intention to challenge the validity of the decision.

[21] Also, the respondents did not file any affidavit purporting to establish a prejudice other than the fact that they will be deprived of the benefit of the time limitation set out in paragraph 18.1(2) of the *Federal Courts Act,* S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27.

[22] As noted by Justice Gilles Létourneau in *Berhard v. Canada*, [2005] F.C.J. No. 1302 at paragraph 60, this 30-day limit is not whimsical. It brings finality to administrative decisions and ensures their effective implementation.

[23] Because this time limit serves the public interest, the respondents vigorously contest this motion on the basis that, in this case, the applicant has failed to provide a reasonable explanation for her lengthy delay in filing this motion for an extension and that her application is not sufficiently meritorious to warrant the exercise of the Court's discretion in her favour.

[24] For the respondents, it is clear that this Court has taken the position that alleged solicitor error or negligence is not a reasonable explanation for not pursuing one's right (See: *Chin v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1033; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 258; and *Cove v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 482).

[25] The respondents note that the aforesaid position is based on obvious policy reasons, for as mentioned in *Williams*, above at paragraph 20, "…the system cannot operate if this is not so".

[26] It also submits that the present matter is analogous to the situation before the Court in *Cove*, above. In that case, the applicant's consultant, whom she trusted and relied upon, had chosen to seek a reconsideration of the immigration officer's decision instead of filing an application for leave and for judicial review. Justice Denis Pelletier refused to grant an extension of time, relying on the reasoning of Justice Reed in *Williams*, above, that, as a general rule, a

client is bound by his or her choice of lawyer or consultant and their lack of diligence or error will be held against them. Justice Pelletier duly noted a possible exception where the actions of the legal advisor are such that they raise a natural justice issue. However, he mentions, as did Justice Marshall Rothstein before him, that such exceptional cases require clear proof of specific facts.

[27] The applicant relies on the more general principle that "…an error by counsel must not prevent the safeguarding of the rights of the party he or she represents where it is possible to rectify the error without injustice to the opposing party" *(*see: *Murray Bowen v. City of Montreal),* [1979] 1 S.C.R. 511 and *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée,* [1997] 2 S.C.R. 299). To illustrate the application of this principle, the applicant pointed to the decision of Justice Yvon Pinard in *New Traditions Music v. Zeke's Distribution,* 2003 FC 1440 [2003] F.C.J. No. 1855, although it is not apparent that this case dealt with an extension of time.[5]

[28] There are, however, other authorities more directly on point such as *Mathon v. Canada (Minister of Employment and Immigration)* (1988), 28 F.T.R. 217, [1988] F.C.J. No. 707, *Panta v. Canada (Minister of Employment and Immigration),* [1993] F.C.J. No. 898, and to a certain extent *Bogdanov v. Canada (Minister of Employment and Immigration) (F.C.A.),* [1992] F.C.J. No. 1190.

[29] Indeed, as was recently noted by Justice Robert Barnes in *Washagamis First Nation v. Ledoux,* 2006 FC 1300, [2006] F.C.J. No. 1639 at paragraphs 31 and 32, there appear to be two

[5] See also *Donovan v. Canada,* [2000] F.C.J. No. 933 (FCA) at par.7

lines of authority on this question. In some of the cases, the Court "treats the client and its counsel as one and does not excuse the client for the negligence or failings of his counsel," whereas "(o)ther authorities have been somewhat more open to excusing a litigant for the failings of its counsel".

[30] This conflict in the Court jurisprudence was also mentioned by the late Prothonotary Hargrave in *Muhammed v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1080.

[31] However, a review of authorities that adopt the stricter approach makes it clear that there is not one automatic rule disqualifying as a reasonable explanation any and all mistakes made by counsel.

[32] Like Prothonotory Hargrave and Justice Barnes, the Court believes that the better approach is to look not only to the behaviour of the solicitor or advisor on a case-by-case basis, but also to the behaviour of the client, in this case the applicant. Also, the Court should consider whether both the legal counsel and the client were diligent in remedying the "mistake".

[33] A careful application of such an approach will avoid the pitfall noted in cases such as *Chin*, *William* and *Cove*, above, that is, of giving counsel a green light to just forget about deadlines by pleading their own negligence (see *Chin*, above, at paragraph 10).

[34] This also means that clients can no longer leave the matter in the hands of their counsel and not take any steps to ensure that their cases are dealt with properly and diligently. They must, among other things, keep track of the progress of their case and seek more detailed information in respect of deadlines, etc.

[35] For example, there is little doubt in my mind that if the decision of July 26, 2005 had included the usual statement that the complainant had 30 days to seek judicial review of the decision by filing an application with the Federal Court, the applicant would have clearly been put on notice and could not argue diligence on her part whatever legal advice was given to her by counsel. But as mentioned, in this case there was no such statement.

[36] The Court is satisfied that in the present case, Ms. Gover was, until she learned of the need to seek judicial review of the July 26, 2005 decision, reasonably diligent in pursuing her rights. In coming to that conclusion, I have considered among other things the absence of the usual statement about judicial review in the decision itself, and the wording of the decision, which could be ambiguous for a lay person. She was clearly in regular contact with the PSAC and had reasons to believe that her union representatives were experienced and knowledgeable in such matters. The telephone message of the Commission staff advising PSAC in December 2005 that the matter would be reconsidered could reasonably have led her to believe that the course of action adopted by her counsel was effectively the appropriate one.

[37] Also, although there is little doubt as to the “proper” interpretation of the July 26 letter, the applicant’s PSAC counsel were clearly not alone in their mistaken belief that the decision in

respect of the differential wage treatment was not final. The behaviour of the Commission's staff contributed to the delay in pursuing the avenue of judicial review, at least up until November 2006, when PSAC was verbally advised that the Commission could not or would not reconsider its decision.

[38] After that date, however, there is no reasonable explanation as to why PSAC could not immediately seek the advice of outside counsel as to the possibility of obtaining an extension and initiate said process.

[39] Nor is the Court satisfied with the explanation given for the delay in bringing the motion for extension. There is no evidence as to any efforts by the applicant herself in respect of speeding up the process. Instead, Craig Spencer refers to the fact that she lives in another city as a justification for the delay. The lack of details as to what happened between November 2006 and the end of March 2007, and what transpired between Ms. Gover, PSAC and the outside counsel leave the Court perplexed. It is clear that the actual merits of the complaint (as opposed to the merits of the proposed application) are not relevant to this motion; it is thus difficult to understand why, as stated by Craig Spencer, it was necessary to obtain records from when the applicant's injury occurred. The evidence produced is quite straightforward and the explanation given is simply not satisfactory. The applicant has not met her burden of satisfying the Court that she acted as diligently as could reasonably be expected in the circumstances.

[40] The applicant argued in the alternative that even if the Court were to conclude that there was no reasonable explanation for the delay, it would still be in the interest of justice that the

extension be granted, because her application is clearly meritorious and an extension would occasion no real prejudice to the respondents. The Court has already dealt with the issue of prejudice (see par. 22 above); it will now review the merits of the application as put forth by the parties.

[41] The main focus was on the notion of continuing discriminatory acts as this was the argument raised before the investigator. Both sides submitted detailed arguments.[6] Among other things, the applicant says that as in *Brooks v. Canada Safeway Lt.*, [1985] M.J No.486[7], the violation of her rights was not limited to the point in time when she was forced off the Injury at work program, but rather that it has persisted and will persist as long as she is on the Leave without pay program.

[42] She also submits that the general principles applicable to a determination of whether or not one is facing a continuing violation of one's human rights should be liberally construed, in the same manner that human right legislation must receive a purposive and liberal interpretation.

[43] On the other hand, the respondents also referred to various decisions supporting their position that in her complaint, the applicant does not refer to a series of separate actions but rather to a single contravention that took place in 1992 which continues to have negative consequences on her.

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[6] Additional written submissions were filed after the hearing.
[7] Aff'd 38 A.C.W.S. (2d) 452 (MBCA)- reversed on other grounds, [1989] 1 S.C.R. 1219

[44] Among the many authorities cited, the Court notes that in *Greenwood v. Alberta (Workers Compensation Board*), [2000] A.J No.1360, 2000 ABQB 827, foll'd by Alberta Court of Appeal in *Allen v. Alberta (Human Rights Commission),* [2005] A.J. No. 1755**,** at paragraph 3, the Alberta Court of Queen's Bench rejected an argument very similar to the one made by the applicant. In that case, Mr. Greenwood, whose claim for additional benefits linked to his mononucleosis was denied by the Workmen's Compensation Board, argued that the continuing refusal of the Board to properly compensate him constituted continuing discrimination, as opposed to a single act of discrimination with continuing consequences.

[45] There are a few decisions broaching the issue of when discrimination occurs in cases involving termination (*Lever v. Canada (Human Rights Commission) (F.C.A.),* [1988] F.C.J. No. 1062 ; *Tse v. Federal Express Canada Ltd.*, [2005] F.C.J. No.740 par.29-30 ; *Latif v. Canadian Human Right Commission* [1980] 1 FC 687 (FCA)). However, there is no case law of this Court or of the Federal Court of Appeal examining the notion of continuing contravention in general.

[46] Considering that the standard of review that would likely apply to this mixed question of fact and law is reasonableness simpliciter, (*Bredin v. Canada,* [2006] F.C.J. No. 1478 para. 26 to 43; *Tamashi v. Canada (Canadian Human Rights Commission*), [2005] F.C.J. No. 1888), it is clear that the applicant has made out an arguable case here. However, the respondents have an equally arguable case of their own.

[47] Thus, on the basis of this argument the applicant certainly meets one of the factors set out in the four- pronged test, but has not established that on this point alone its application is particularly meritorious.

[48] In addition to the above, the applicant argues that the Commission should also have exercised its discretion to extend the time limit in her favor, particularly considering that she obviously tried to pursue the matter through an internal grievance process. Moreover, according to the applicant, it is arguable that the Commission breached its duty to act fairly, insofar as the Commission's initial investigation of her complaint obviously lacked thoroughness[8]. She claims that the fact that her legal counsel had to meet with Ms. Shukuru and that the Commission's investigative branch felt it necessary to seek outside legal advice indicate that the issues raised in her complaint were complex enough to have warranted a more thorough investigation by the Commission from the outset.

[49] For the respondents, there was no need for the Commission to exercise its discretion as the applicant neither sought an extension nor argued in favor of one. With respect to the grievance process, the respondents note that the applicant herself says that the matter was not grievable; it is thus irrelevant. Finally, with respect to the alleged duty to have undertaken a more thorough investigation, the respondents rely upon *Canada Post v. Canada* (*Human Rights*

[8] The additional argument that the applicant should have been given an opportunity to comment on the outside lawyer's opinion was not aired at the hearing; At this stage given that the decision under review pre dates these events, it appears to have little merit.

Commission), [1997] F.C.J. No. 578 para.4, aff'd [1999] F.C.J. No.705, where Justice Marshall Rothstein wrote that:

> " a decision by the Commission under that subsection is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, **the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases…"**.

[50] However, this last argument appears to support rather than diminish the applicant's case, at least at this early stage. In effect, considering the Court's earlier finding that both sides have at this stage arguable cases as to when the discrimination occurred, the applicant's case in respect of the further issue of whether it was sufficiently plain and obvious that her complaint was out of time to allow the Commission to dismiss it without further investigation, appears strong.

[51] The Commission would certainly benefit from a determination of its duty and powers in similar instances, as well as from a clear pronouncement of this Court on the issue of continuing discrimination.

[52] As mentioned at the outset, the four-pronged test was developed to help the Court determine what would best ensure that justice be done between the parties in a given case.

[53] This case has been particularly difficult to decide because of the applicant's inadequate explanations for her delay in seeking the extension after discovering the initial mistake, but after considering the particular circumstances of the case, the Court concludes that it is nevertheless in the interest of justice that the applicant be granted the extension she seeks.

ORDER

THE COURT ORDERS THAT:

1. The applicant is granted leave to serve and file her notice of application for judicial review of the decision of July 26, 2005 on or before December 7, 2007.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**07-T-18**
STYLE OF CAUSE:	**JANET GOVER** **and** **HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by Treasury Board and Canada Border Services Agency**
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	SEPTEMBER 6, 2007
REASONS FOR JUDGMENT:	GAUTHIER J.
DATED:	November 7, 2007

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