

**Date: 20100226**

**Docket: A-595-08**

**Citation: 2010 FCA 66**

**CORAM: SEXTON J.A.  
DAWSON J.A.  
LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**NICO VAN DUYVENBODE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on February 23, 2010.

Judgment delivered at Ottawa, Ontario, on February 26, 2010.

**REASONS FOR JUDGMENT BY:**

**DAWSON J.A.**

**CONCURRED IN BY:**

**SEXTON J.A.  
LAYDEN-STEVENSON J.A.**

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

[1] This is an application for judicial review of a decision of the Public Service Labour Relations Board (Board) refusing to grant the applicant an extension of time to file a grievance. The issue on this appeal is whether the Board's refusal was reasonable.

**Facts and Procedural History**

[2] The applicant was an employee in the federal public service. He alleges that he began to suffer harassment and discrimination at the hands of his supervisors in 1997. Rather than file a

grievance in respect of that conduct, in 2003 the applicant commenced a civil suit in the Ontario Superior Court of Justice claiming damages arising from the alleged harassing and discriminatory conduct. The decision to pursue a civil claim reflected the applicant's opinion that his concerns would not be dealt with adequately through the dispute resolution system provided under the applicable federal legislation.

[3] In April, 2006, the applicant moved in his civil suit for an injunction to prevent the termination of his employment. The motion was dismissed because the applicant failed to establish the existence of irreparable harm. In dismissing the motion, the Court noted that if the applicant's employment was terminated he could grieve the termination and upon adjudication he could be granted a range of remedies as provided for in the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (Act). The Court expressed doubt that the plaintiff could maintain his civil suit.

[4] On May 3, 2006, the applicant's employment was terminated. No grievance was filed. Instead, the applicant amended his pending civil suit to put in issue the alleged unlawful termination of his employment.

[5] On June 25, 2007, the applicant's statement of claim was struck out on the basis of the decision of the Supreme Court of Canada in *Vaughan v. Canada*, [2005] 1 S.C.R. 146 and section 236 of the Act which, as of its enactment in 2005, barred any court action with respect to any dispute relating to an employee's termination or conditions of employment. The applicant received notice of the decision striking his claim on July 7, 2007.

[6] On August 24, 2007, the applicant contacted the Board concerning his complaints. He was advised that he required an extension of time in order to pursue grievances and that he should apply for an extension without delay. An application for an extension was received on November 30, 2007 by the Board.

[7] The request for extension was refused by the Board on October 29, 2008. That refusal is the decision now before the Court.

#### The Decision of the Board

[8] The Board commenced its consideration of the issue by enumerating the criteria that it was to consider when adjudicating a request for an extension. No complaint is raised with respect to the Board's articulation of the relevant criteria.

[9] The Board then found that the applicant had failed to provide any cogent or compelling reasons for his delay in filing a grievance. This was viewed by the Board as being dispositive of the request for extension. The Board went on to note that "the length of the delay is extensive, the respondent did not exercise due diligence and the prejudice to the employer outweighs any injustice to the respondent."

#### The Errors Alleged by the Applicant

[10] The applicant asserts that the Board's conclusion that he had not provided any cogent or compelling explanation for the delay was unreasonable in two respects. First, he says that the Board

misunderstood the effect of the decision of the Supreme Court of Canada in *Vaughan*. Second, the applicant says the Board ignored evidence.

### Standard of Review

[11] The parties agree that this was a discretionary decision of the Board that warrants the highest level of deference. I agree. The decision should therefore be reviewed on the standard of reasonableness.

### Application of the Standard of Review

[12] The applicant asserts that his decision to pursue a civil suit provided a clear, cogent and compelling explanation for not launching one or more grievances on a timely basis and that the Board erred by stating that after the *Vaughan* decision was issued in 2005 it "became clear [...] that the grievance process was the proper forum."

[13] I see no error in the Board's reasons on this point. In *Vaughan*, the Supreme Court held that workplace disputes should be dealt with within the statutory redress mechanisms enacted by Parliament. At the same time, a small residual jurisdiction was acknowledged to remain in the courts. The Board, at paragraph 42 of its reasons, acknowledged this residual jurisdiction. Contrary to the applicant's submission, the Board did not find that *Vaughan* prohibits all access by public servants to the superior courts in respect of workplace disputes.

[14] Similarly, I do not agree that the Board ignored evidence. The applicant argues that the Board ignored his evidence that he first contacted it in August, 2007, and instead found that he did not request an extension of time until November, 2007. At paragraph 24 of its reasons, the Board referred to the applicant's first contact with it in August, 2007. Therefore, the Board did not ignore that evidence. It was not unreasonable for the Board to rely upon the November, 2007 date because it was not until then that the applicant filed his formal request for an extension of time.

[15] At all material times the applicant knew of the existence of the grievance mechanism. He ignored this mode of redress because he did not believe his concerns would be adequately addressed in that forum. At the time his claim for injunctive relief was dismissed in April, 2006, the Supreme Court of Canada had delivered its reasons in *Vaughan*, and that decision was referenced in the reasons of the Court dismissing the request for injunctive relief. In response to the motion to strike his claim, the applicant attempted to argue that he was a "whistleblower" so as to fall within the Court's residual jurisdiction articulated in *Vaughan*. The Court rejected this argument stating that there was "no air of reality" to that claim. Only after his action was struck out by the Court did the applicant take steps to pursue an extension of time in order to pursue one or more grievances. In his application for an extension of time his complaints were said to date from 1997.

[16] This is not a case where an innocent error was made with respect to the choice of forum. The applicant made a deliberate choice not to grieve because of his view that his concerns would not be adequately dealt with. On those facts it was open to the Board to find that no compelling reason had been provided for failing to file a grievance on a timely basis.

[17] The Board gave intelligible reasons that justified its conclusion. That decision fell within the range of possible outcomes that could be defended on the basis of the applicable facts and law. The Board's decision was, therefore, reasonable.

[18] For these reasons, I would dismiss the application with costs.

“Eleanor R. Dawson”

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J.A.

“I agree

J. Edgar Sexton J.A.”

“I agree

Carolyn Layden-Stevenson J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-595-08

**STYLE OF CAUSE:** NICO VAN DUYVENBODE v.  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 23, 2010

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** SEXTON J.A.  
LAYDEN-STEVENSON J.A.

**DATED:** February 26, 2010

**APPEARANCES:**

Christopher C. Rootham FOR THE APPLICANT

Neil McGraw FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada