Federal Court of Appeal | Cour d'appel fédérale

Date: 20200526

Docket: A-120-19

Citation: 2020 FCA 96

CORAM: **DAWSON J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

OKHOI LAIRENJAM

Applicant

and

UNIFOR NATIONAL COUNCIL 4000 and CANADIAN NATIONAL TRANSPORTATION, LIMITED

Respondents

Heard by online video conference hosted by the Registry on May 22, 2020.
Judgment delivered from the Bench on May 22, 2020.
Reasons for judgment delivered at Ottawa, Ontario, on May 26, 2020.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: RENNIE J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The applicant was an owner-operator of a truck that provided services to Canadian National Transportation, Limited. His employment was terminated after the British Columbia Ministry of Transportation issued a ticket to the applicant for failing to maintain his truck in a safe operating condition.

[2] The applicant's union, Unifor National Council 4000, declined to take the applicant's grievance of his termination to arbitration. In the Union's view, an arbitration was unlikely to succeed because the applicant had four Step 3 discipline assessments in his disciplinary record.

[3] The applicant filed a complaint with the Canada Industrial Relations Board alleging that the Union had breached its duty of fair representation. On March 21, 2018, the Board dismissed the applicant's complaint (2018 CIRB LD 3946). Over six months later, on October 5, 2018, the applicant filed an application with the Board asking the Board to reconsider its decision of March 21, 2018. The applicant submitted that there had been a new development as of September 12, 2018, when a stay of proceedings was entered with respect to the ticket alleging that the applicant had failed to maintain his truck in a safe operating condition.

[4] Section 18 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 permits the Board to "review, rescind, amend, alter or vary any order or decision made by it". Subsection 45(2) of the *Canada Industrial Relations Board Regulations, 2012*, SOR/2001-520, requires that an application for reconsideration must be "filed within 30 days after the date the written reasons of the decision or order being reconsidered are issued." Therefore, the applicant's request for reconsideration was filed almost six months out of time.

[5] Section 46 of the Regulations permits the Board to exempt a person from complying with any time limit where the "exemption is necessary to ensure the proper administration of the Code."

[6] For reasons cited 2019 CIRB LD 4100, the Board declined to grant the applicant the requested extension. In its reasons the Board noted its jurisprudence to the effect that its discretion to extend the time limit for filing an application for reconsideration is to be exercised sparingly and only in exceptional circumstances (*Via Rail Canada Inc.*, 2007 CIRB 381). The Board concluded that the applicant's explanation for his delay did not constitute an exceptional circumstance that warranted an extension of the time limit. For this reason, the Board found that the application for reconsideration could not succeed.

[7] This is an application for judicial review of the Board's decision refusing to reconsider its prior decision on the ground that the application for reconsideration was not made on a timely basis. On May 22, 2020, judgment was rendered from the Bench dismissing the application with costs for reasons to follow. These are the Court's reasons for dismissing the application.

[8] On this application the applicant does not take issue with the legal test applied by the Board when it considered the request for an extension of time. Rather, he argues that the Board committed an error of mixed fact and law when it concluded that the change in circumstances – the stay of proceedings issued in respect of the traffic ticket that led to his termination – was not an exceptional circumstance that warranted an extension of time.

[9] The applicant acknowledges that the Board's decision on this question is to be reviewed by this Court on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65, at paragraph 85).

[10] While the Board chose to base its decision on the issue of timeliness, when speaking to the merits of the application for reconsideration the Board noted, correctly, that when considering an asserted breach of the duty of fair representation the Board is to examine "the union's conduct, not the merits of the grievance." The Board went on to state:

> In its original decision, the Board concluded that the union had made an honest assessment of the applicant's grievance based on the facts of his case and the applicable law when it reached its decision not to take his case to arbitration. The reconsideration panel has not been persuaded that this conclusion would be altered by the new information: the fact that the court proceedings to dispute the ticket have been stayed has no bearing on whether the union acted in an arbitrary, discriminatory or bad faith manner when it assessed the merits of the applicant's grievance.

[11] The Board went on to observe that while the applicant argued in the application for reconsideration that the Union should not have made a decision until the outcome of the disputed ticket was known, the applicant raised this issue for the first time on the application for reconsideration.

[12] The Board's findings on these points demonstrate that its conclusion that the stay of proceeding was not an exceptional circumstance to warrant an extension of time was reasonable. The stay of proceedings was not relevant to the question of whether the Union's decision not to refer the applicant's grievance to arbitration was, at the time the decision was made, arbitrary, discriminatory or made in bad faith.

[13] The Board's decision to refuse an extension of time was a factually-suffused question, well within the Board's expertise. The Board's decision was based on an internally coherent and rational chain of analysis that was justified in relation to the facts and law that constrained it.

Reasonableness review requires this Court to defer to the Board's decision (*Vavilov*, at paragraph 85). It is not for us to re-weigh the evidence and substitute our own conclusion.

[14] It follows that despite the able submissions of counsel for the applicant I would dismiss the application for judicial review with costs payable by the applicant to each respondent.

"Eleanor R. Dawson"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-120-19
STYLE OF CAUSE:	OKHOI LAIRENJAM v. UNIFOR NATIONAL COUNCIL 4000 and CANADIAN NATIONAL TRANSPORTATION, LIMITED
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MAY 22, 2020
JUDGMENT DELIVERED FROM THE BENCH:	MAY 22, 2020
REASONS FOR JUDGMENT DELIVERED AT OTTAWA, ONTARIO BY:	DAWSON J.A.
CONCURRED IN BY:	RENNIE J.A. LOCKE J.A.
DATED:	MAY 26, 2020

APPEARANCES:

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Anthony F. Dale	FOR THE RESPONDENT UNIFOR NATIONAL COUNCIL 4000
Adrian Elmslie	FOR THE RESPONDENT CANADIAN NATIONAL TRANSPORTATION, LIMITED

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