Federal Court of Appeal | Cour d'appel fédérale

Date: 20230531

Docket: A-13-22

Citation: 2023 FCA 119

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

JILL ANDREWS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 29, 2023

Judgment delivered at Ottawa, Ontario, on May 31, 2023

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
MACTAVISH J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230531

Docket: A-13-22

Citation: 2023 FCA 119

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

JILL ANDREWS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

LASKIN J.A.

[1] The applicant, Ms. Andrews, seeks judicial review of a decision of the Federal Public Service Labour Relations and Employment Board (2021 FPSLRB 137). In its decision, the Board dismissed her application under section 61(b) of the *Federal Public Sector Labour Relations Regulations*, S.O.R./2005-79, for an extension of time to file a grievance against the

termination of her employment. Subsection 61(b) authorizes the Board to grant an extension "in the interest of fairness".

[2] The applicant's collective agreement set a 25-day time limit for filing a grievance, which, in her case, ran from January 31, 2020. The applicant applied to the Board for an extension on May 4, 2021, some 15 months after the deadline had passed.

[3] The applicant based her application on what the Board described as "the well-known criteria" set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75, for determining whether the Board should exercise its discretion under section 61(b). These criteria comprise (1) clear, cogent and compelling reasons for the delay; (2) the length of the delay; (3) the due diligence of the grievor; (4) balancing the injustice to the employee against the prejudice to the employer in granting an extension; and (5) the chance of success of the grievance.

[4] In addressing the first four criteria, the main factor on which the applicant relied was that "[it had] taken [her] over two years (from March 18, 2019 to April 28, 2021) to do a complete review of the 1,975 pages of documents related to [her] employment case, and prepare comprehensive electronic documents". Somehow, she misunderstood the process and mistakenly believed that these steps were necessary before a grievance could be filed. She also claims that she did not realize that there was a deadline for filing the grievance.

[5] As authorized by section 22 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, the Board decided the application based on the written material filed, without holding an oral hearing. In its reasons it reviewed the parties' submissions on each of the *Schenkman* criteria, noting before doing so the statement in *Martin v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 39 at para. 70, that the criteria are not all necessarily of equal importance, and their weight in any particular case may differ. The Board concluded that, weighing the *Schenkman* criteria, it was not in the interest of fairness to grant an extension. The applicant seeks judicial review of that decision.

[6] Before this Court, the applicant also seeks the admission of fresh evidence in support of her application, comprising 40 additional documents. She acknowledges that these documents were not themselves before the Board. However, she submits that the Board had before it some of the information the documents contain.

[7] This Court summarized the law governing the admission of fresh evidence on judicial review in its decision in the companion application commenced by the applicant, *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159, leave to appeal refused, 2023 CanLII 10480 (SCC), challenging the Board's dismissal of her claim that her bargaining agent breached its duty of fair representation. As the Court there set out (at paras. 18-21), the general rule, subject only to limited exceptions, is that the only evidence that can be considered on judicial review is the evidence that was before the administrative decision-maker. Here, the applicant relies on the exception for "general background", which the case law describes as evidence providing general

background where that information might assist the court in understanding the issues relevant to the judicial review, but does not add new evidence on the merits.

[8] In my view, the evidence the applicant seeks to adduce here does not come within the "general background" exception. Rather, the motion to adduce the 40 documents amounts to an attempt to reconstruct the specifics of the applicant's interactions and communications with her employer and with her bargaining agent, so as to buttress her case on the merits. I note in addition that all of these documents were available to her when she filed her application and her reply with the Board. The applicant's fresh evidence motion should therefore be dismissed, and the proposed fresh evidence struck from the record.

[9] The applicant also submits that the Board breached its duty of procedural fairness and natural justice, and that its decision is accordingly reviewable on the standard of correctness. Under this rubric she argues that while the Board was correct in utilizing the *Schenkman* criteria to assess whether it should exercise its discretion to grant an extension, the Board "failed to correctly consider the overall circumstances of the matter, thus impacting its assessment and application of the Schenkman criteria to the facts of the matter", and that "had the Board correctly considered the totality of the circumstances, it ought to have allowed [her application]" (Applicant's memorandum at paragraphs 62-63).

[10] Properly characterized, these submissions go not to procedural fairness and natural justice but to the merits of the Board's decision. The standard of review applicable to the Board's

discretion to grant an extension of time under section 61(b) is reasonableness: *Popov v. Canada (Attorney General)*, 2019 FCA 177 at para. 10.

[11] Reasonableness is a deferential standard. It does not entitle a reviewing court to reweigh the evidence before the decision-maker, as the applicant would have this Court do. Rather, our role is limited to focusing on the decision actually made, and to ascertaining whether it is "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 85.

[12] As the applicant acknowledges, the Board applied the proper criteria in considering her application for an extension of time. In doing so, it considered the facts before it, and explained in its reasons its assessment of each criterion and its overall conclusion. In light of the Board's process and its reasons, I cannot agree with the applicant that its decision was unreasonable.

[13] I would, therefore, dismiss the application. At the hearing, the respondent withdrew the claim for costs included in the respondent's memorandum. It follows that no costs should be awarded.

[14] When this application was commenced, the style of cause named the respondent as Deputy Head – Department of Fisheries and Oceans. The parties are agreed that, having regard to rule 303(1) and (2) of the *Federal Courts Rules*, S.O.R/98-106, the proper respondent is the

Attorney General of Canada. The style of cause should be amended accordingly, as reflected in these reasons and the Court's judgment.

"J.B. Laskin"

J.A.

"I agree.
de Montigny J.A."

"I agree.
Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-13-22
STYLE OF CAUSE:	JILL ANDREWS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 29, 2023
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. MACTAVISH J.A.
DATED:	MAY 31, 2023

APPEARANCES:

Jill Andrews	ON HER OWN BEHALF
Chris Hutchison	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT